REPORTS

OF

CASES

ADJUDGED IN THE SUPREME COURT

OF THE

PROVINCE OF NEW BRUNSWICK,

COMMENCING IN HILARY TERM,

1835.

BY GEORGE F. S. BERTON,

BARRISTER AT LAW.

FREDERICTON:

John Simpson, Printer to the King's Most Excellent Majesty.

1835.

ADVERTISEMENT.

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GAZETTE OFFICE,
Fredericton, 2d March, 1835.

PREFACE.

In offering to the Legal Profession and the Public, Reports of the Cases adjudged and determined before the Supreme Court of this Province, I beg leave to state that I am actuated solely by a wish to be of service. Such a work has long been much desired, and every year must become of more importance; and as no other person has undertaken the task, I have determined to attempt it myself rather than allow the many important Judgments and Opinions delivered at every Term to remain as sealed Books to the greater part of the Profession.

I shall begin with the current year, at the commencement of the labors of the Bench, as now constituted.

His Honor the Chief Justice and the other Judges have kindly expressed their approbation of my design. If that of my Professional Brethren is added, I shall not regret the time and labor I may expend.

G. F. S. BERTON.

Fredericton, 21st February, 1835.

SUPREME COURT OF JUDICATURE.

The Hon. WARD CHIPMAN, Chief Justice.

" WILLIAM BOTSFORD, } Justices.

" JAMES CARTER, }

" ROBERT PARKER, }

" CHARLES J. PETERS, Attorney General.

" GEORGE F. STREET, Solicitor General.

" JOHN S. SAUNDERS, Advocate General.

REPORTS.

Hilary Term, 1835.—*5th William 4th.*

THE KING,
v.
John Wilson and others.

THIS was an Information for Intrusion on Crown Lands, in Charlotte County, tried at Bar in last Hilary Term —Verdict for Defendant. The Attorney General moved, in the same Term, to set aside the Verdict; the grounds were—1st. That a Plan, purporting to be a Grant plan, was improperly received in Evidence, not being annexed to the Letters Patent. 2d. That the Grant, called the "Chamcook Grant," did not include the *locus in quo*, and was not intended so to do. The cause having been argued at the present Term by the Attorney General for the Prosecution, and by Mr. Street (the Solicitor General,) for the Defendant—The Chief Justice now delivered the opinion of the Court:

Upon the first point, it appeared in Evidence that Colin Campbell had found the Plan and the Grant together in the same bundle of papers left by his Father, that they had been in his possession 25 years, and his Father had held them for a longer period before that: The proper place for a Plan is in company with the Grant which refers to it. It is said this Plan was never annexed to the Grant, but it is material that the Grant refers to a Plan, and in the habendum, the lots are designated only by numbers, referring to the Plan; and there is an exception out of the Grant of a particular Lot, No. 70, and of certain tracts "*marked on the Plan*," it is obvious that effect can be given to the Grant only by the Plan. It cannot be supposed the Grant issued without a Plan; the maxim of Law is, that a Public Officer shall be supposed to have properly discharged his duty. The Plan is signed by the Surveyor General, whose duty it was so to authenticate it: an objection was taken that this was not the best evidence—that a copy of the Plan might have been procured from the Records; but if there is Evidence to authenticate this as the original, it is the best evidence. The Court are of opinion that the Plan was sufficiently authenticated, and was properly received in Evidence.

The second point was fairly put by the Attorney General, what did the King intend to grant, what did the Subject expect to receive? The Premises are a tract of Land comprehended by metes and bounds, containing 500 acres with allowance for Roads. The statement of quantity never can be held to circumscribe or diminish the Land actually contained within the limits of the Grant—the ques-

tion depends on the statement of the boundaries: One line is to extend 32 chains, or until it meets certain Farm Lots, (being the rear of another Grant.) Shall the line then terminate at the 32 chains, or extend to the Farm Lots? On inspection of the Plans and Grants, all shew that the intention of the Crown was to grant the whole Land, and that one Grant should be bounded by the rear of another—the second words "or until it meets," &c. must be held the controlling words. The person who prepared the Grant, evidently supposed the 32 chains would comprehend the whole ground:—The Verdict for Defendant must stand:—His Honor expressed the satisfaction of the Court that this decision would not interfere with the rights or possessions of those who had so long been quietly in possession of the Land.—*See Com. Dig. Tit Fait, D. 4, as to construction of Grants.*

NOTE.—The Chief Justice stated, that this was distinctly and properly the opinion of Botsford J. and himself, the two surviving Judges who heard the argument; the Judgment had been submitted to Carter J. who concurred therein; Parker J. having been, while at the Bar, retained as Counsel in the matter, declined giving any opinion.

Wiggins, } *Trespass for taking and carrying*
v. } *away Timber.*
White, Garrison, and Woods. } Plea 1st. Not Guilty.

2d. As to the taking and carrying away, &c. White and Garrison pleaded that it was seized by Garrison, as the Deputy of the Sheriff, White, under a Writ of Replevin, at the suit of Woods against one William Turner; and that the same, just before the taking, &c. had been taken possession of by the Plaintiff under a sale from one Dibblee, but there was no allegation of fraud or collusion. To the second Plea, Plaintiff demurred.

The Demurrer was argued in Michaelmas, by the Solicitor General for Plaintiff, and N. Parker for Defendant.

Chipman, Chief Justice :

This question depends on the exigency of the Writ of Replevin. The argument for Defendants is, that the exigency of the Writ is to replevy the Goods specified therein, and that the identity thereof is the only thing material. The Counsel for the Plaintiff urges that it is further requisite that the Goods be found in the possession of the Defendant against whom the Writ issued;

I am clearly of opinion that the last is the correct construction. Replevin is an action of a peculiar nature in which the Plaintiff is in the first instance put in possession of the Goods in dispute, and the Defendant may claim and have a return of the Goods; and from the principle in Replevin that the Defendant, and the Defendant alone, can claim and have a return, it is evident that the Goods can only be replevied from the person against whom the Writ issued. The English Practice (see Sellon's Practice,) our Rules of Court. The Writ itself, the Capias to bring the Defendant into Court, the Replevin Bond, all shew and confirm the same doctrine. There must be Judgment for the Plaintiff on the Demurrer.

Botsford, J.:

The Writ of Replevin is confined to the Parties named in it. The

Action of Replevin should be extended wherever it can, and should be encouraged; but it might be greatly abused if the Sheriff could under the Writ take property from a stranger.

Carter, J.:

Not having heard the argument, did not give an opinion.

Parker, J.:

Concurred. The plea admits that the Goods were replevied from a stranger, against whom it is admitted that replevin would not lie, because he neither took nor commanded the taking. The Writ gives a general direction to the Sheriff, but it does not mention the numerous exceptions thereto; yet the Sheriff is bound by those. I need only mention the familiar instance of a *Fi Fa.* The Sheriff is commanded to take the Goods of Defendant, but although he may see them through a window, yet he cannot break the door to get them, and may return *nulla bona.* The Sheriff under a Writ of Replevin cannot take the Goods out of the possession of a stranger.

Ward, } CLEARY, the Attorney for the Plaintiff, in last Hilary Va-
v. } cation issued a Writ of Inquiry of Damages, returnable in
Dow. } Easter Term. The Jury would not give a Verdict for any thing in favor of the Plaintiff, and not being able to find for Defendant, were dismissed without giving a Verdict. The Plaintiff's Attorney, in Easter Vacation, issued another Writ, and Damages were assessed at £20. In Trinity Term last, Wilmot for Defendant, obtained a rule *nisi* to set aside the second Writ of Inquiry and Inquisition for irregularity with Costs. The irregularity complained of was, that the second Writ of Inquiry was improperly issued without the leave of the Court having been first obtained. Berton for Plaintiff, showed cause in Michaelmas

Per Curiam.

We think the Plaintiff has pursued the correct course, and that which was least expensive to the Defendant.

Rule discharged with costs.

Rex, } *Indictment for obstructing a Highway.* Tried before
v. } Botsford, J. in Michaelmas Term.
Sterling. } ON the part of the Prosecution, a Record of the Road made by the Commissioners of Highways of the Parish of Saint Mary's, in York County, was put in Evidence. The Road never had been marked or laid out on the Land, and never had been opened. Several points were taken by the Solicitor General for the Defendant:

1st. That it was necessary to shew not only the Record of the Road but that the previous steps required by the Act, in altering a Road, had been taken by the Commissioners, and that the Record could not be considered even *prima facie* Evidence of the correctness of the preliminary proceedings.

2d. That the Road never had been laid out and opened. and therefore could not be considered a Highway.

3d. That before the Road could be opened, it was necessary that the compensation awarded to the Owners of the Land should be first paid.

The Points were reserved, and a Verdict entered against the Defendant.

The Solicitor General having obtained a rule *nisi* to enter a Verdict for the Defendant upon the Points above stated.

D. L. Robinson at this Term shewed cause.

The Court in giving Judgment, considered only the second point.

Chipman, Chief Justice:

This is an Indictment for obstructing a Highway. The obstruction must be shewn upon a Highway. It is not necessary to remark on the doctrine of *usor*. It is quite sufficient to refer to the Act of Assembly, 50 Geo. 3, c. 6, under which these proceedings were had. This return is not sufficient Evidence of a laying out. It is not necessary for the decision of this case to prescribe what would be sufficient, but in the present case the return or Record does not specify or particularly define through what part of the Lands the Road was intended to pass; it is so vague that the intended course cannot be ascertained,—one expression is "running from point to point, as straight as the nature of the ground will permit." The strong inclination of my opinion is, that in order to make a good laying out under this Act, there must be some marking out upon the Land—this may also be designated upon a Plan. The return is only the Record of the Road as actually laid out, and the tenth section of the Act clearly shews that the Road muat be "laid out," before it is entered in writing or recorded.

Botsford, J.:

In order to sustain this Indictment, it is necessary to establish the *locus in quo* to be a Highway. The Act of Assembly, before referred to, prescribes the course the Commissioners are to pursue; their duty is plain, and following the directions of the Act there can be no difficulty; but here, instead of doing so, from some fear of the correctness of their own acts, as appeared by the evidence of one of the Commissioners, they have neglected to open the Road, and have instituted this proceeding to test their legality. Looking to the return, can any person point out the exact course of the Road? If Evidence had been adduced of the actual laying out of the Road, I am not prepared to say the return, vague as it is, would not be sufficient Evidence. The return or Record is not to be made until the Road is actually laid out.

Carter, J.:

The *locus in quo* must be shown to be a Highway. Even granting that the return is correctly made, it must be so definite that any person may go upon the Land and point out the Road. Here two persons may go from one *terminus* to the other by different courses.

Parker, J.:

The only question I will consider here is—Is the Road laid out? What, in the first place, is a Road? It is a piece of ground stretching from point to point and of a certain specified width. The Record is not the laying out the Road, but the Evidence of it. Then is it to be Evidence of an act or of an intention only? Who can, by the Record before the Court, point out the Road?

Verdict entered for the Defendant.

Dickinson, } *Assumpsit.* Tried before the Chief Justice, at the
v. Carleton Circuit, in September last.
Balloch. } The Declaration contained only the Common Count's Plea—the General Issue with notice of set off.

The Plaintiff's demand was for a large quantity of Timber, for work and labour in driving that Timber, and there were also sundry small items of account. By an agreement put in Evidence, by the Plaintiff, it appeared that Defendant was to make Timber in the Woods, and Plaintiff to haul it, and have one half for so doing—but the first half that was hauled was to belong to Defendant, and he was also to have the refusal of the remainder. By the same agreement it appeared that Defendant had paid Stumpage on the Timber, amounting to £25, one half of which was to be repaid to him by Plaintiff. Plaintiff alleged that Defendant had received much more than his half, and sought to recover payment for the remainder—the Evidence on this point was vague, and it evidently was not considered sufficient by the Jury. There was Evidence also of work and labour, and it was questionable if the Jury did not set off the £12 10*s.* tonnage money, against that—the amount, if sufficiently proved, being about that sum. Two items, amounting to 25*s.*, were clearly proved. No evidence was offered on the part of the Defendant. The Jury found a general Verdict for the Plaintiff for 25*s.*

In last Michaelmas Term, Berton and Wilmot for the Defendant, obtained a rule *nisi* to enter a suggestion to deprive the Plaintiff of Costs; they urged that the 10th Section of the Provincial Act of 50 G 3, c. 17, was a literal copy from the London Court of Requests Act; and that by the decisions under that Statute, the Verdict must be considered the amount in demand. They cited 2 Tidd's Prac. 994, 4 Burr. 2133, 8 East. 238, 346, 1 M. & S. 393, 6 Taun. 452, 1 Taun. 397, 2 Cromp. & Jer. 505, 4 B. & C. 769, 1 Dowl. Pr. Ca. 580, 2d do. 58.

The Solicitor General at this Term shewed cause, and contended that this Action did not come within the intent of the Act of Assembly. It was for a large and important demand, and the Verdict was a general one, and it could not be said that it was upon any particular item of the account, and further that the sum of £12 10*s.* mentioned in the agreement must be considered in the nature of a set off; he urged that had the Verdict been for the Defendant, the learned Judge would not have certified to give double costs, and that shewed the cause was not within the Act. The Action could not have been tried in a Justice's Court.

Chipman, Chief Justice:

This action was for Goods sold—the Verdict was for 25*s.* The cause involved matters of a large amount; there were two small articles proved distinct therefrom, which made exactly the amount of the Verdict. It has been contended on the part of the Plaintiff that the real matter or cause of Action should be considered. The law is clearly settled that the sum recovered by the Verdict is to be considered the Debt due—4 B. & C. 769, 2 C. & J. 505, 1 Dowl. Pr. Ca. 580, 603, 704, all settle the same point—*prima facie* the Verdict is Evidence of the Debt due. In 2 Dowl. Pr. Ca. 58, the Plaintiff failed in proving part of his demand from the absence of a

Witness. The Verdict being under £5, a suggestion was entered. The Law, as collected from these cases, is, that the amount of the Verdict is the sum in demand, and the onus is on the Plaintiff to shew circumstances to take the case out of the Rule. Here it is evident that but for the two items, before mentioned, the Verdict would have been for the Defendant.

Botsford, J.:

I entertained doubts upon a case in 8 E. 346, where Lord Ellenborough remarked upon the Plaintiff having a reasonable cause to bring his Action for a larger sum than £5. But the Law is clearly settled by later decisions. The present case is stronger than 1 M. & S. 394, where failing on the special counts, Plaintiff recovered a small Verdict on a balance of large accounts. 6 Taun, 452, is clear also as to the Verdict being the amount of the Debt.

Carter, J.:

Looking at the circumstances and applying the Verdict to the Evidence, little doubt can be entertained that the Verdict in this case was for the two small items; but even supposing it were otherwise—that the Verdict was upon the larger claim, the case in 2 Dowl. Pr. Ca. 58, and other cases, make it imperative to enter the suggestion. I cannot draw a distinction between this and the case I have mentioned.

Parker, J.:

I have looked at all the cases. There appears a perfect unanimity in Westminster Hall upon the subject. The Verdict is the general rule, not the exception. The Judge's notes shew there was doubtful evidence of the larger demands, and clear proof of the small—and so His Honor charged the Jury. The Court must be satisfied that the Jury found upon the large demand and not on the small, or the suggestion must be entered.

Rule made absolute.

Foulis, v. *Kinnear & another.* } *Action of Assumpsit.*—Referred by Rule of Court. Judgment to be entered on award as on the Verdict of a Jury.

The award was made on the 8th July—the first day of Trinity Term, 1834. In Michaelmas Term, Wright for Defendant, obtained a rule *nisi* to set aside the award upon two grounds:

1st. The award was not conclusive.

2d. The improper conduct of the Plaintiff's Attorney.

Cause was shown at this Term by N. Parker for Plaintiff, and the Solicitor General was heard in reply.

Chipman, Chief Justice:

The first point depends upon the circumstance of the Arbitrators having thrown out of their consideration two articles, a Cylinder Bottom on the one side, and certain Boiler Plate on the other, which they directed to be exchanged. Now if the Arbitrators undertook to determine the Law upon this subject, it was competent for them to do so, and the Court will not interfere; but on this point, even if there were grounds for the application, the Defendants are out of time. The award was made on the 8th July—the Defendants were

aware of it before the 11th, and if they did not know, had full opportunity to inform themselves of the grounds of it; they suffered the Trinity Term to pass, and on the 22d day of July gave notice of motion. The same rule as to time must prevail in this case, as in motions for new trials—the award being entered on the *postea* as the Verdict of a Jury.

As to the second point. It is stated there was misconduct on the part of the Plaintiff's Attorney. To support that, it should be clearly shown that there was a breach of faith in entering up the Judgment; but the paper to support that contains no condition precedent to, but is predicated upon the award. It expressly states the award, and merely guarantees the return of one article when the other shall be restored. There is not the slightest ground of imputation against the Attorney.

Botsford, J :

The award is final, so far as as the Arbitrators have considered the accounts. It appears that the two articles they directed to be interchanged, they considered not matters of account, and as they could determine Law as well as fact, the Court will not decide that they have not done right; but at any rate the Defendants are guilty of *laches*. On the 11th July, they expressed that the award would be paid with the costs, although they were dissatisfied. The last day of Trinity Term was the 19th, and not until the 22d, did the Defendants intimate their intention to question the award. On the 1st of August notice of Taxation of Costs was given, and Judgment was signed on the 5th August. The Defendants should not have allowed the Term to pass.

As to the second point. No imputation can be cast upon the Attorney; he has acted correctly and with diligence.

Carter, J.:

The award is final. It awards £11 10 10 to be paid to the Plaintiff, and the other articles are not considered.—As a matter of Law—the Arbitrators determined, the two articles were not included in the reference, and did not consider them in making up the amounts of the accounts; but under the circumstances merely directed an exchange.

The Attorney appears to have acted properly and honorably, and the Defendants are clearly in *laches*.

Parker, J.:

Concurred. The Action was for Goods sold and delivered. The Arbitrators were to consider what Goods were so; they determined that the two articles could not be so considered. Some discrepancies appeared in the affidavits, which however could be reconciled; but it was worthy of remark, that there were in this case two Defendants, and two Attornies jointly acting for them—all of whom acted in the matter of the reference, and yet the Affidavit of only one had been offered: the Court should have had Affidavits from all. As to the conduct of the Attorney—when the term improper was applied, there should have been something to found it upon: there was clearly nothing. The Defendants were in *laches*, in not having moved in Trinity Term.

Rule discharged with Costs.

John Heaney, *v.* *Richard Lynn.* } *Action for a Malicious Prosecution for Felony.* Tried before Botsford, J. at the Northumberland Circuit, in September last, when the Plaintiff was non-suited. The question arose upon the production of the Record of Acquittal of the Plaintiff.

An order of the Judge, presiding at the Court of Oyer and Terminer, having been obtained, the Clerk of that Court was sworn as a Witness, and produced the Record, signed by himself, as the Officer of the Court. J. A. Street for Defendant, inquired from whence he obtained the Record, by whom was it made up, and had it been compared with the Indictment, &c. Berton for Plaintiff, objected to any question being put, and to the admission of any parol Evidence, to affect or impugn the Record. The objection was overruled, and it was stated by the Witness that the Record was made up by Mr. Harding, the Plaintiff's Attorney, who filed it with him, and that he had not examined its contents with the original papers. Two objections were then taken:

1st. That even if the Record was correct, an order of the Supreme Court should be obtained for its production, without which it could not be received in Evidence.

2d. That it could not be considered a Record of the Proceedings in the Criminal Prosecution.

Berton contra. As to first objection, cited Leggatt *v.* Tollervey, 14 East. 302, and urged that the Record being properly authenticated, could not be questioned.

The learned Judge supported the objection, and ordered a non-suit.

In Michaelmas Term, a rule *nisi* was obtained to set aside the non-suit and grant a new Trial upon the grounds taken at *Nisi Prius*.

J. A. Street at this Term showed cause.

Chipman, Chief Justice:

This is an Action for a Malicious Prosecution for Felony, in which the Plaintiff was acquitted. A Record was offered in Evidence, produced by the Deputy Clerk, in whose custody it was. I am of opinion that the Record, however improperly made up, could not be questioned at the Trial. The Rule as to affording copies of Records in such cases was made by the twelve Judges, and is a wholesome restraint upon Actions which might tend to prevent the prosecution of public offenders. The Clerk acted improperly in authenticating a Record made up by the Attorney for the purposes of this Action. It is upon his signature the Record depends, and a Record produced from his custody, and with his signature, cannot be questioned. A copy of the Indictment should not have been furnished except upon the order of the Judge, and I think the application for such an order should have been made in open Court—nevertheless these matters cannot be looked into at *Nisi Prius*. The case of Leggatt *v.* Tollervey is conclusive.

Botsford, J.:

There should be an application in Court when the circumstances are fresh in the mind of the Judge, for a copy of the Indictment; but I am now satisfied that the Record should not have been refused.

Carter, J.:

However culpable the Clerk of the Court may have been in producing the Record, it should have been received, and could not be questioned when produced.

Parker, J.:

The same case as this came up in Leggatt *v.* Tollervey, and clearly settles that the Record cannot be refused. No copy of the Indictment should have been furnished, without the order of the Judge or the fiat of the Attorney General.

The Executors of Grosvenor, *v.* *Charlotte Agnew.* } *Assumpsit.* The Declaration in this Cause contained Counts on promises to Testator, and also on promises to the Executors, and a Count on an account stated with the Plaintiffs as Executors. The Plaintiffs were non-suited. The Master having refused to tax the Defendants costs—1st. Because as Executors they were not liable to pay costs, and 2d. Because he was a party Plaintiff. Berton at this Term moved for a rule *nisi*, to allow the Defendant her costs, and that the same should be taxed by one of the Judges of the Court, and cited 2 Chit. Pl. 102, 110, and 9 Bar. & Cres. 666, Dowbiggin Admx. *v.* Harrison. Robinson for Plaintiffs, showed cause, and urged that the case cited in Bar. & Cres. was directly contrary to all the other cases.

Per Curiam.

This case is precisely the same as the one cited at the Bar, and as the latest decision the Court must be bound by it.

Carter, J. mentioned, that since the case of Dowbiggin *v.* Harrison, it was very unusual in England to insert a Count on an account stated with Executors.

Rule absolute.

ADVERTISEMENT.

SINCE the Publication of the first Number of this Work, induced by kind offers of assistance received from Members of the Profession in different parts of the Province, I have determined to add to the succeeding Numbers such *Nisi Prius* Cases, involving legal points, as may occur. This Number contains several Cases tried at Bar during the Term.

The Work will be continued during the present Year at the cost originally mentioned; after which, the expense of Publication, &c. will render an increased rate of Subscription necessary.

G. F. S. BERTON.

CASES TRIED IN EASTER TERM,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

NOTE.—In this Term there were present only His Honor the CHIEF JUSTICE and Mr. Justice CARTER.

SCOULLAR *vs.* HAZEN.

THIS was an Action on the case against the Defendant as Sheriff of Sunbury County, for the escape of a Prisoner in custody under *mesne* process.

A Debt of £60 and upwards from Prisoner to Plaintiff, the issuing of process, the arrest and escape were established. It appeared that the Prisoner was not possessed of any property except £8 in money at the time of the escape; evidence was given that some security would have been offered for the debt if the Prisoner had not escaped, but the sufficiency of the intended security was very doubtful.

The Solicitor General, for Defendant, contended that if the Jury thought no damage had been sustained by the Plaintiff they were not bound to give even nominal damages, but might find for the Defendant—5 T. R. 37, Plank *v.* Anderson.

Berton contra, cited 1 Saun. Pl. and Ev. 483, 2 Bing. Rep. 317, Barker *v.* Green.

Carter, J. directed the Jury that the escape having been proved, some damage had been established, because the Plaintiff had lost that which the Law considered one means of satisfying a debt, viz.: the body of the debtor. He left it to them to consider what pecuniary compensation would satisfy that loss, and also directed them in ascertaining the amount of damages to consider by how much the Plaintiff's chance of getting his debt was worse by reason of the escape than if there had been no escape.

Verdict for Plaintiff—Damages £10.

Cleary and Berton for Plaintiff.

Solicitor General for Defendant.

WHITE *vs.* BABCOCK.

Assumpsit by the Indorsee against the maker of the following Instrument, declared upon as a Promissory Note within the Statute.

"Ten days after date, I promise to pay Mr. Marcus Scully or order, the sum of £44 currency, (or such other balance of his account furnished,) for a Survey made for the Magistrates of the County of Charlotte of a certain piece of Land at Saint Andrews, commonly called the Commons, as per account annexed. Fredericton, first August, 1833. "WILLIAM BABCOCK.

"Account—say £64 0 0
"Paid Sheriff, £12 3 6
"By Starritt, 7 0 0
£19 3 6
£44 16 6

(Indorsed.) "*Fredericton, 16th Nov.* 1833.
"Pay to Stephen White, or order, the amount of this Note of Hand.
"M. SCULLY."

The Solicitor General for Defendant contended that this Instrument could not be considered a Promissory Note within the Statute, and therefore moved for a non-suit.

Chipman, Chief Justice. Is it usual when you may demur or can move in arrest of Judgment for a defect appearing on the face of the Record to move for a non-suit? I know where it clearly appears that there is no cause of action the Court will non-suit; but I have doubts if it is usual to do so when the action is upon a written Instrument, which is clearly set out in the declaration.

The Solicitor General cited 2 Ch. on Pldg.; (5 Ed.) 700 Note; 1 Camp. 256, and 2 Star. N. P. C. 375, to shew that under any circumstances the Court would entertain the motion, and proceeded to argue that the writing declared upon and produced in evidence was not a promise for a specific sum, but for an amount to be ascertained by future investigation. In Smith, &c. *v.* Nightingale, 2 Star. 375, the promise was for a certain sum, but being also for a further uncertain amount, was held not within the Statute. He cited also 4 B. & A. 679, Ferris *v.* Bond, Nealis *v.* Langen, &c. M. S Trin. 1834, Ch. on Bills, 42, 66, and 4 M. & S. 25, Hartley *v.* Wilkinson.

Wilmot, for Plaintiff, urged that the amount of the Note was rendered certain by the memorandum at the foot of it. In Hartley *v.* Wilkinson, the condition was indorsed on the Note, and the contingency affected the whole Note. In this case if there was any contingency it affected only the sum.

Chipman, Chief Justice. I entertain a clear opinion upon the point. To make an Instrument negotiable and current, the sum to be paid must be certain and fixed—it must be distinctly stated, to be for money, for what certain amount, and payable without any contingency. Looking at this paper it does not possess those requisites—it is not absolutely for £44, but for whatever balance was really due to the payee. It is said the memorandum at the foot makes it certain, but if that were true why insert the contingency, and besides the amount of the Note is £44, of the memorandum

£44 16*s.* 6*d.*, shewing yet more plainly that the sum mentioned in the Note was merely nominal—the real amount, more or less, remained to be ascertained. I consider the paper as merely an agreement between Babcock and Scully to pay the amount of Scully's account.

The Plaintiff was non-suited.

Robinson and Wilmot for Plaintiff.

Solicitor General for Defendant.

DUNN and WIFE *vs.* MILLER.

This was an Action of Trespass for an Assault on Sophronia Dunn, one of the Plaintiffs—a feme Covert.

The Defendant pleaded—1st. The General Issue. 2d. That Defendant was lawfully possessed of a certain dwelling house, and being so possessed the said Sophronia was unlawfully in the said house, and with force, &c. making a great noise and disturbance, and thereupon Defendant requested her to cease and depart from said house, which she refused to do—whereupon Defendant in defence of his possession gently laid hands upon the said Sophronia in order to remove her out of the said House, as he lawfully might—which are the trespasses, &c.

Replication —De injuria sua propria.

The Defendant was possessed of a house in Fredericton—the Plaintiff was negotiating for a lease of it; the Defendant had sent a workman to make some repairs in the house, and while these were going on, some of the Plaintiff's goods were hurriedly moved into the house—furniture had been arranged in one room, and more was being carried in; when Defendant coming to the house, was informed of the circumstance by his workman. An altercation ensued between Defendant and Mrs. Dunn; he threatened to throw the furniture into the street; she dared him to meddle with it; and thereupon the Defendant committed the assault charged, and afterwards left the house—Mrs. D. and the furniture still remaining there. Evidence was given of the subsequent illness of Mrs. D. as ground of special damage.

After the close of the Plaintiff's case, Wilmot stated that a Witness, on the part of the Plaintiff, was anxious to return to the stand to correct a mis-statement she had made when under examination.

The Solicitor General, for Defendant, objected. Th ewitness had retired, and had communication with the parties; while on the stand she might have corrected a mis-statement, but to allow a witness under the present circumstances to make a new statement would be striking at the root of the advantage of cross-examination. Why were witnesses excluded (if desired,) from Court but to prevent them from hearing the statements of each other, and by that means making their tales agree. Such a proceeding would be useless, if they could be permitted after conversing together to return and correct their testimony.

Chipman, Chief Justice. It must be a matter of discretion in the Court. I will allow the witness to come to the stand, but will not allow her to be questioned except by myself.

The Solicitor General, in opening the defence, contended that the only point to be determined was as to the possession of the premises. If the Defendant was justified in using any, the slightest force or violence, he was entitled to a verdict; if the violence had been excessive, the Plaintiffs should have replied specially. In support of this doctrine he cited Dale *v.* Wood, 7 B. Moore's Rep. 33, Bowel *v.* Purry, &c. 1 Car & Payne, 394.

The Defence being closed, Wilmot was about to give further testimony as to the possession, and tendered evidence of a Licence of occupation of the premises from Defendant to Plaintiff.

It was objected by the Solicitor General, that the Plaintiffs having in the first instance given evidence of circumstances rebutting the plea of Justification, were not now entitled to add further testimony upon that point. Rees *v.* Smith, 2 Star. Rep. 31, Roscoe's Ev. 139, Brown *v.* Murray, Ryan & Moody's Rep. 254.

Wilmot contra, contended that the Plaintiffs case had been directed professedly to the assault, and they had not attempted to answer the Justification—not one witness had been called upon that point.

Chipman, Chief Justice. said that he entertained no doubt on the point. The principle is clear and it is a reasonable principle, that when the case on the part of the Defendant is apparent on the pleadings, the Plaintiff should go into all his case at once, or else confine himself strictly to the General Issue; but if a Plaintiff goes into any part of his case rebutting a Justification, he must go into the whole, and not take it piecemeal. In this case there are two pleas—first, the General Issue;—by the second, the Defendant avers that he was in possession of the premises, and being disturbed by the Plaintiff gently laid hands upon her and put her out. The learned Counsel, for the Plaintiff, in his opening went into the whole case; he opened all the pleadings and used the expression, "we shall show the Plaintiff, Mr. Dunn, in quiet possession," &c. He undertook to rebut the affirmative plea by proving a contradictory affirmative, viz.: a possession in Dunn; and in proving his case gave evidence as to the possession on the day of the affray and also on the day previous—then if the Plaintiffs had further testimony they should have produced it at once, and not have waited to see what the Defendant could prove.

His Honor directed the Jury that it was necessary to support the Defendant's plea, that they should be satisfied that the Defendant was in possession of the house—that the Plaintiff entered therein and disturbed his possession; that he requested her to depart, and that he laid hands upon her with the intention of putting her out of the house, and only used the force complained of for that purpose. If the assault was occasioned by angry or excited feelings, the Defendant was not justified.

Verdict for Plaintiffs—Damages £40.
Dibblee and Wilmot for Plaintiffs.
The Solicitor General for Defendant.

WILMOT *vs.* CORNWELL and BABINO.

The Solicitor General on a former day in this Term applied on behalf of the Defendant Cornwell, a confined debtor in Westmorland, for relief under the Act of Assembly, 1 W. 4, c. 43; the affidavit of the Defendant stated his inability to support himself, and that he had no property; it was entitled "Wilmot *vs.* Cornwell."

Berton contra, produced affidavits of Plaintiff and others, which contradicted the affidavit of the applicant in several particulars, but did not show him to be possessed of property or means of support—shewing also that Babino was a co. Defendant, and contended—1st. That the applicant's affidavits were improperly entitled, Babino not being named a Defendant therein. 2d. That the applicant's statements being contradicted in several instances, were unworthy of credit and could not satisfy the Court.

Chipman, Chief Justice. now delivered the opinion of the Court: We are of opinion that although the Acts of Assembly contemplate the application being made in the suit, yet upon the whole it may be considered a distinct Judicial proceeding—one which may be taken not only in the Court wherein the suit is or has been prosecuted, but before Justices of other Courts, and it would therefore perhaps be giving the Acts too strict a construction to require greater correctness in the titles of the affidavits or application. We are less inclined to dismiss the application on the first ground of objection as the second is so material that it cannot be got over. The law provides that it must appear to the Court that the person has no property or means of support. The Defendants affidavit taken alone is exceedingly loose; no schedule of property is annexed, although one is spoken of in the affidavit—nor is the property mentioned therein sufficiently accounted for; and the statements of the Defendant are so contradicted by the affidavits produced on the other side, and so contaminated, that we can give no credence to them unsupported as they are by other testimony. It is sufficient therefore to say that we are not satisfied, upon the affidavits, that the party is entitled to relief; he must satisfactorily account for all property he may appear to have possessed.

Application dismissed.

THE EXECUTORS OF ANDREWS *vs.* JOSEPH N. CLARKE.

S. G. Andrews, one of the Plaintiffs, gave notice to Defendant of an application for leave to issue a *Ca Sa* to arrest Defendant a second time, on the ground that he had been discharged from arrest under a former Execution by fraud and collusion with DeVeber, a co-Executor and Plaintiff—the notice was subscribed S. G. Andrews, acting Executor.

Wilmot moved for Rule *nisi*, which was obtained by consent of Defendant's Counsel—who stated his reason for such consent, that the Defendant had been put to expense in preparing affidavits to resist the application and shew the merits of the case, which expenses he could not recover, under the practice of the Court, unless the Rule should be granted. The cause was therefore entered in the Special Paper of the Term.

On hearing a part of the affidavits in support of the Rule, the Court determined that the Defendant having been discharged by one Plaintiff could not be again arrested at the instance of another. They allowed the Defendant's affidavits to be filed in answer to those produced on the other side, and discharged the Rule with costs, to be paid by the applicant, S. G. Andrews.

Wilmot for Plaintiff.

Berton for Defendant.

LESLIE *vs.* RAE.

Wilmot moved to discharge a peremptory undertaking to try at this Term, and for leave to discontinue without costs, on an affidavit which stated that Defendant had been seen by Deponent in the United States, where he was employed in digging a Cellar; that he told Deponent he did not intend to return to this Country; and Deponent believed at the time he went away from the Province he was not worth much property.

Berton contra, contended that the affidavit was insufficient even to enlarge the peremptory undertaking; the absence of the Defendant was a circumstance of no importance, and no evidence of insolvency had been offered.

Per Curiam:

The Plaintiff has shewn no cause to enlarge the peremptory undertaking; the Defendant may have left property in the Province, or if not a Judgment against him could follow him to the place of his abode.

Rule absolute for Judgment for Defendant.

ABBOTT *vs.* LEDDEN.

Berton moved for security for costs on an affidavit shewing that Plaintiff was out of the jurisdiction of the Court, and an affidavit of Defendant's Attorney, stating that he had put in the Post Office at Newcastle, a letter addressed to the Plaintiff's Attorney at Saint John, containing a demand of security and notice of this motion.

The Court doubted if posting a letter was a sufficient service of notice on the opposite Attorney, in order to obtain a stay of proceedings; but afterwards on the authority of Aldred *v.* Hicks, 5 Taun. 186, granted Rule *nisi*, with stay of proceedings.

TRINITY TERM,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

PETER FISHER *vs.* BRYCE JEWETT and JOSHUA JEWETT.

Assumpsit on a Promissory Note, dated 22d January, 1825, for £22, payable in June following; drawn by Defendants in favor of James Dingee, and by him indorsed to Plaintiff. Joshua Jewett was not served with Process. Bryce Jewett pleaded—1st. Non-assumpsit, 2d. Infancy, 3d. Statute of Limitations. The Plaintiff replied to second plea—That the Defendant before the commencement of this suit, to wit, on the 1st day of December, A. D. 1830, attained the age of 21 years, and afterwards and before the commencement, &c. to wit on the 1st day of July, A. D. 1831, undertook and promised, &c.; and to the third plea—Assumpsit infra sex annos :—Rejoinder to Replication to second plea—That Defendant did not, after he attained the age of 21 years, undertake, &c. The cause was tried before *Chipman, Chief Justice,* at Bar in last Michaelmas Term. It was proved on the part of the Plaintiff, that in the winter of 1831–2, Defendant acknowledged that he had drawn the Note, but stated that he was under age, and therefore not legally liable to pay it, but he was satisfied his Father (the other Defendant,) had the Cattle, (in payment for which the Note was given), and he felt bound to pay it; that he would pay the Note as soon as the Timber was down—perhaps by the 1st day of July, it might be a month or two later for part of it. It was proved, that he expressly and positively promised to pay the whole in the course of the season.

A nonsuit was moved for by *Wilmot* for Defendant, on the ground that an Infant can in no case be liable to the Indorser of a Note, in support of which doctrine, 2 Esp. N. P. C. 628, Thrupp *v.* Fielder, 5 Esp. 102, Harmer *v.* Killing, Chitty on Bills, 16, 17, Trueman *v.* Hurst, 1 T. R. 40, 2 Barn. & Cres. 824, Thornton *v.* Illingworth, 4 D. & R. 545, and 8 East. 330, were cited.

Fisher contra, cited 4 Esp. N. P. C. 188, Roscoe's Ev. 256, 246, 2 Saun. Pl. & Ev. 581.

The Chief Justice refused the non-suit, but gave leave to move the Court in Banc to enter a non-suit. A verdict was thereupon ta-

ken by consent for the face of the Note, £22, without interest, subject to the opinion of the Court, on the motion and under the pleadings in the cause.

A rule *nisi* having been obtained to set aside the Verdict and enter a non-suit, the cause was argued in Hilary, and stood over for consideration until this Term.

CHIPMAN, CHIEF JUSTICE. At the trial of this cause, a doubt was started—whether as the question might have been raised upon the Record, it should be entertained on a motion for a non-suit; but the practice is so clearly settled, that when the Plaintiff has no right in point of Law to recover, a non-suit will be ordered, although the objection appear upon the Record, that I merely advert to this doubt for the purpose of disposing of it.—See 2 Tidd's Prac. 267, (3d Ed.) 1 Camp. 256.

general

The grand question which this case presents is this—Whether a negotiable Note made by an Infant, is such a contract as the Infant may in Law ratify and confirm when he arrives at full age, and thereby bind himself to perform; for the promise made in this case at full age was distinct and express, and so found by the Jury.

There is much vagueness and confusion in the Books in the use of the terms void and voidable, as applied to the contracts of Infants; but the true character of such Contracts may nevertheless be ascertained with sufficient precision:—thus *Per Curiam*, in Holt *v.* Ward, Strange 938, (1731,) "The contract of an Infant for necessaries will bind him as necessary to his preservation; in such case a single bill will bind him, though a bond with a penalty shall not. When the contract may be for the benefit of the Infant, or to his prejudice, the Law so far protects him as to give him an opportunity to consider it when he comes of age, and it is void or voidable at his election; but though the Infant has this privilege, yet the party with whom he contracts has not—he is bound at all events." and

Per Lord Chief Justice Eyre, in Keane *v.* Boycott, 2 H. Bl. Rep. 511, "Some contracts of Infants even by deed shall bind them. Some are merely void, viz. such as the Court can pronounce to be to their prejudice; others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only; and it is in the election of the Infant to affirm them or not."

In Cookshott *v.* Bennet, 2 T. R. 766, it was said, per Ashhurst, J. "This is not like a security given by an Infant which is only voidable, for that may be revived by a promise after he comes of age. In such case, he is bound in equity and in conscience to discharge the debt, though the Law would not compel him to do so; but he may waive the privilege of infancy, which the Law gives him, for the purpose of securing him against the impositions of designing persons; and if he choose to waive his privilege, the subsequent promise will operate upon the preceding consideration.

Lord Chief Justice Gibbs said, in Bruce *v.* Warwick in error, 6 Taun. 118. "The Court are all of opinion that the judgment of B. R. is perfectly right. It has been urged that it is incumbent on the Defendant in error to show that an Infant can enter into a trading

contract; the general Law is, that the contract of an Infant, may be avoided or not at his own option. We are of opinion, that this is in the same case, as other contracts made by an Infant, which he may either avoid or enforce at his pleasure." And in Bacon's Abridgment, 354, it is laid down "that the contract of an Infant not absolutely void, but only voidable at his own election, is a doctrine now settled and established."

The general rule then, without encumbering one's self with the terms void and voidable, clearly is, that it shall be in the election of an Infant, when he arrives at full age, whether to affirm a contract made by him during his infancy or not.

If at full age he does affirm and ratify the contract, he is bound by it.

In Southerton *v.* Whitlock, Strange 690, before Raymond, Ch. J. it was held that if goods which are not necessaries, are delivered to an Infant, who after full age ratifies the contract, by a promise to pay, he is bound; and he left it to the Jury whether there was any confirmation of the contract at full age.

In 2 Atk. 34,————————————Lord Hardwick, Ch. J. said, "If an Infant take up goods before he comes of age, and gives a note for it after he is of age, if there is no fraud, it is good at Law;" and by the same, in Smith *v.* Trench, ibid 245—"If an Infant who contracts a debt during his minority, shews his consent to it by confirming it after he comes of age, it shall effectually bind him, though it was voidable at his election."

There are many other authorities to the same effect, and as a general rule, it is unquestionable, that a promise made by an Infant after he comes of age, will bind him to the performance of a contract, made by him, during his minority.

To these general rules there are nevertheless some exceptions; Thus it is held that an Infant cannot bind himself even for necessaries by an obligation with a Penalty, and that he cannot bind himself for payment of Interest, and an obligation under a Penalty and a contract for payment of Interest are held to be, on the face of them, so clearly prejudicial to an Infant, that they cannot be set up by a promise at full age.

In Co. Lit. 172, the Distinction is taken that an Infant may bind himself to pay for his necessary meat, drink, apparal, necessary physic, and such other necessaries, and likewise for his good teaching and instruction whereby he may profit himself afterwards; but if he bind himself in an obligation, or other writing with a penalty for the payment of any of them, that obligation shall not bind him.

Fisher *v.* Mowbray, 6 East. 330, wasan action of Debt on Bond, plea Infancy. Replication setting forth condition of Bond, inter alia, for payment of interest. Demurrer and Joinder. Lord Ellenborough, Ch. J. said—"This goes beyond all the other authorities in charging the Infant with interest, and this objection goes not only to the quantum of damages but to avoid the whole security, for the judgment must be for the sum due on the Bond, and part of that sum is due for interest, for which an Infant cannot give security."

In Baylis *v.* Dineley, 3 M. & S. 477, Lord Ellenborough said, "It is clear upon the face of the instrument, that it is to the prejudice of the Infant, for it is an obligation with a penalty and for the payment of Interest."

But I do not find any decided case, or even any dictum, that an Instrument, merely because it is by the commercial law negotiable, is on the face of it so prejudicial to an Infant, as not to admit of confirmation when he comes of age; and if such had been the Law, it is most extraordinary, that in the universal prevalence of such instruments in modern times, there should not have been an adjudged case to this effect; the authority of the most approved writers on the Law of Bills of Exchange and Promissory Notes is directly in favor of such contracts, falling within the general rule and admitting of such confirmation.

The drawing, indorsing or accepting Bills by an Infant is voidable only, not void; and if he ratify the act after he comes of age, it will bind him. Bayley on Bills, (5th Ed.) 45, citing Gibbs *v.* Merill, 3 Taun. 307. and in Chitty on Bills, (8th Ed.) 23, "As the contract of an Infant is only voidable and not absolutely void, he may, by a promise to pay the Bill made after he attains full age, and before action, (2 B. & C. 824,) render it as operative against him, as if he had been of age at the time it was made. (Taylor *v.* Croker, 4 Esp. R. 187.)

The dicta of Text writers such as those which I have quoted, are at the least, good evidence of what are the received rules of Law on the subject of which we are treating.

In Taylor *v.* Croker, Lord Ellenborough applied the general rule, of Infants confirming contracts after they became of age, to a Bill of Exchange.

And in another late case, to which I shall presently more particularly advert, (2 B & C. 824,) although the Judges in terms considered all contracts made by Infants for purposes of trade as absolutely void, and not merely voidable, yet they recognized the doctrine of the Infant when at full age, binding himself to the performance of such contracts.

I am therefore of opinion, that a negotiable instrument made by an Infant, is not by law distinguished from other contracts, which may be confirmed by him after he arrives at full age; and be thereby rendered binding upon him; and this being a contract not made under seal, a verbal confirmation is of as high authority in the contemplation of the Law as a confirmation in writing, in cases where a written promise is not expressly required by Statute; and by a late Statute in England, (9 G. 4. c. 14, s. 5,) indeed, confirmations after full age, of promises made by Infants, must be in writing.

Having come to this conclusion on the general question, I will only add with regard to the particular circumstances of the present case, that I have not found in the English Books any authority for holding, that a contract of suretyship is distinguishable from the general run of contracts made by an Infant, and is incapable of being confirmed at full age. The general rule is, and I think it just and

reasonable, that the contracts of Infants should be deemed capable of being confirmed when they arrive at full age; and I should not be disposed, to limit the operation of this rule, beyond what decided cases of binding authority oblige me to do.

It was argued by the learned Counsel for the Defendant, that the legal effect of the note was to bear interest from the time when it became payable, and therefore according to Fisher *v.* Mowbray, 8 E. 330, it was utterly void against the Infant Defendant, and would not be made valid by a promise at full age; but there is a clear distinction between cases, where there is an express undertaking to pay Interest on the face of a written intrument, and where it is only allowed by the usage of trade, as in the present instance. In the latter, it constitutes no part of the Debt or Contract, but is in the nature of damages, which a Jury may allow or not, according to the circumstances of the case. Interest cannot be added to the principal sum due on a Bill of Exchange, so as to constitute a good petitioning Creditor's Debt, unless Interest be specially made payable on the face of the Bill 2 B. & A. 305, Cameron *v.* Smith, and in 10 Bing 257, it is said "A Plaintiff cannot arrest for Interest, unless reserved by the Bill."

In the present case therefore, as there is not an express undertaking on the face of the Note to pay interest, it does not fall within the range of the case of Fisher *v.* Mowbray, or Baylis *v.* Dineley, which I have referred to, and it is to be remembered that at the trial, the learned Counsel for the Plaintiff very discreetly, waived all claim to Interest, and took his verdict for the principal only.

There is still another point, on which from the impression of the Judges, in Mounten *v.* Illingworth, 2 B. & C. 824, I at first entertained some doubt, viz. whether the distinction should not have been founded on the special promise after the Defendant became of age. In that case, Bailey, J. said,—"In the case of an Infant, a contract made for goods for the purposes of trade is absolutely void, and not voidable only; the law considers it against good policy, that he should be allowed to bind himself by such contracts. If he make a promise after he come of age, that binds him on the ground of his taking upon himself a new liability, upon a moral consideration existing before, it does not make it a legal Debt from the time of making the bargain." And per Holroyd, J. "The new promise is the sole ground of action, and not the renewal of the old one." And per Littledale, J. "The contract of an Infant under such circumstances as the present, being void and not voidable, the promise in this case did not prove that any legal cause of action existed at the time when the action was commenced, but infancy is a personal privilege, which the Infant may or may not set up, in answer to an action brought upon a contract made during his infancy. The constant course and settled rule therefore seems to be, to declare on the original contract, and if the Defendant pleads infancy, to state the promise made at full age in the replication, or if the defendant gives infancy in evidence under the general Issue, to

give the subsequent promise in evidence, and I again see no ground for a distinction in this respect, between negotiable instruments, and other parol contracts." The only point decided in Mounten *v.* Illingworth was, that the confirmatory promise after full age, must be made before the commencement of the action.

Upon the whole, I am of opinion that the rule for entering a nonsuit, must be discharged.

Botsford, J. I concur in opinion with his Honor the Chief Justice.

The question, whether the contract of an Infant is void or only voidable, must depend upon the nature and circumstances of the case, and in many instances, must remain in doubt and uncertainty, until the Court shall have decided, whether it be one of benefit or prejudice to his interest—a rule so variable may in some measure account, for the conflicting decisions in the books, and may have led to that general position, that the deeds of Infants are not void, but only voidable, and will admit of subsequent confirmation by them. Lord Hardwicke held in Harvey *v.* Ashby, 3 Atk. 607, that where an agreement appears upon the face of it to be prejudicial to an infant, it is void; but if for his advantage then voidable only. In Zooch, *v.* Parsons, Lord Raymonds Rep. 818, the semblance of benefit to the Infant was made the ground of Lord Mansfield's decision, by which the surrender of a Mortgage by an Infant was held to be voidable only, contrary to the opinion of the Court in Thomson *v.* Leach, 3 Mod. 300, which made the surrender of an Infant by deed absolutely void. It was this rule by which the case of Keane *v.* Boycot, 2 H Bl 511, and Warwick *v.* Bruce, 2 M. and Sel. 205, were decided.

In looking to the facts and circumstances of the case now before the Court, and supposing the contract, to be one rather of prejudice than benefit to the Infant, I had great doubt, whether the present action could be sustained, but these doubts have been removed by the case of Bishop *v.* Chamber, in 3 Car and Payne 55, which I consider much in point. The law seems settled that Courts, will support actions against infants, if they confirm their contracts after they come of age (except in the few cases of contracts with penalties, for interest, &c.) as already mentioned.

I have considered all the cases with attention, and am of opinion that the rule should be discharged.

Carter, J. I am also of opinion that the rule for a non-suit in this case should be discharged.

I shall not take up time unnecessarily, by reviewing all the cases on this point, after they have been so carefully gone through, by His Honor the Chief Justice. The general rule which I deduce from them, is this—that if a person after attaining full age confirm a contract entered into during infancy, such confirmation being express and voluntary, and with a full knowledge of the privilege that the Law allows him of avoiding his former contract, such confirmation is one which may be enforced by Law. This rule seems to me so consistent, with the principles of reason and justice, that I should not be inclined to narrow its limits, more than decided cases compel

me to do. Much difficulty has arisen on this point, from the use of the terms absolutely void, and voidable, as terms of classification for the contracts of Infants. Now it would seem quite clear, that a contract which could be pronounced absolutely void, in the full extent of the meaning of those words, could not be confirmed by any subsequent acknowledgment or promise, and would be one, of which the Infant himself could not take advantage, as stated by Mr. J. Best in Goode *v.* Harrison, 5 B. & A. 147. It would therefore seem reasonable, that the Court should only pronounce the contract of an Infant absolutely void, where they can pronounce from the terms of the contract itself, that it must be prejudicial to the Infant; and that where they cannot from the terms of the contract itself, pronounce whether it is advantageous, or prejudicial to him, they will leave it to his own election, after he attains full age, to decide whether he will avail himself of the privilege the Law allows him, and avoid his contract or not. Consistently with this view of the case, I find the only cases in which it has been decided, that the contract of an Infant cannot be confirmed by a subsequent promise after full age, in the cases of an obligation, with a penalty, and for the payment of interest, Baylis *v.* Dinely, 3 M. & S. 477, and Fisher *v.* Mowbray, 8 East. 330. There the Court distinctly held that the obligation was void, because on the face of the instrument itself, it was clearly to the prejudice of the infant.

To apply these rules to the present case—This Note is not for the payment of interest, and can the Court by looking at the note say that its effect must be to the prejudice of the Infant? I think certainly not. We find then that after he attains full age, being aware that he was not legally liable on account of his having been under age when he drew the note, he voluntarily and expressly promises to pay it. Under these circumstances, it occurs to me that he is in law bound by that promise, and that therefore this rule must be discharged.

Parker, J. I am free to confess, that during the trial and subsequent argument, and until I had carefully examined the various cases on the subject of Infants' contracts, the inclination of my mind was in favor of the Defendant; yet I am now happy to say on full consideration, my opinion is in accordance with that of the Chief Justice and the rest of the Court.

It is singular, that among the variety of cases, commencing with the earlier Reporters, and extending down to the present time, none are to be found in which the point in question has come up for express decision in Westminster Hall, although one would suppose it must have frequently occurred in the ordinary business of life: Upon more than one occasion however it has been adverted to, and I shall cite some authorities, in which the Courts of England have treated contracts like the present, if not strictly speaking capable of ratification, yet as affording a sufficient consideration to render valid a subsequent promise made for their performance.

The contracts of infants have been divided into three classes, viz. *good, void* and *voidable*. The first, such as bind the Infant from the

time of the making, requiring no affirmance or acknowledgment, and admitting of no avoidance at full age, extend not beyond necessaries, unless indeed the general principle laid down by Lord Mansfield be adopted—that if an agreement be clearly for the benefit of the Infant at the time, it shall bind him. Much discussion has taken place as to the binding nature of a marriage settlement by an Infant, with the consent of parents and guardians, in which a good deal of general learning as to the acts of Infants may be found. 3 Atk. 610. 2 Eden. 72, 1 Bro. C. C. 106, 18 Ves. 275, 5 B. P. C. 570, 2 T. R. 159.

In the second class, viz. such as have no operation, being wholly incapable of confirmation by any promise at full age, the Court have placed bonds made with penalties, for which a double reason is given, that Infants are not bound by forfeitures, and cannot be made chargeable with interest, Cro. Eliz. 700 & 920, 8 East. 330, 3 M. & S. 477, Co. Litt. 172 a. 10 Bing. 257; and the rule would appear by the reasons given in these cases, to comprehend all contracts, to the nonfulfilment of which penalties are annexed, or by which interest is expressly secured, tho' before it is extended so far, a further consideration would be highly desirable.

Warrants of Attorney made by Infants have also been considered void and set aside by the Court. Rep t. Wards, 376, W. Bl. 1133, 1. H. Bl. 75.

In two old cases, in Cro. Car. 502, & 3 Mod. 301, a rent charge and a surrender of lease made by Infants were held void, but from more recent decisions it would seem that such were capable of ratification. Hudson *v.* Jones, 3 Mod, 301, and Zooch *v.* Parsons, 3 Burr. 1794, and the cases there cited.

All contracts of Infants other than those above enumerated, have either by express decisions been included in the third class of voidable, or remain to have their department assigned to them as they may seem to fall, either in this or the preceding division. I speak of *voidable* contracts under one head, although some, of the nature of the present, might with more propriety be termed *affirmable*, as not requiring any act to repudiate them, but needing an express confirmation and promise at full age to render them obligatory. There is manifestly a great want of precision in the language of some of the learned Judges, as their opinions are reported; the distinction between void and voidable is often not adverted to; many contracts are spoken of as void, not because they were incapable of, but because they had not received, an express confirmation, 1 Vern. 132, 2 M. & S. 205, and the same case in error, 6 Taun. 118. The language of Bayley, J. in 2 B. & C. 824, already adverted to by the Chief Justice, is remarkable, and that of Mr. J. Littledale is to the same effect.

After the full review which the different cases have already undergone, I will not take up time by again going over them. I come to the same conclusion as His Honor, that in whatever way the Courts may have expressed their meaning at different times, the general rule deducible from all cases is broadly this—that the contract of an infant is not absolutely void, but voidable or affirmable at his election, the few instances of valid and absolutely void contracts being exceptions. 4 Bac. Abr. 354, Str. 938 & 690, Fitzg. 175 & 275, 2 Atk. 34 & 243.

The reasons urged by the learned Counsel for the Defendant for making the present case an exception to the above rule, are :

1st. That the contract on which the action is brought is a negotiable instrument, and consequently liable to be enforced by a person not one of the original parties.

2nd. That it is necessarily a contract for payment of interest.

These objections are on the face of the instrument.

3d. That the Defendant did not himself receive value for the note, but signed it as a surety for his father, the other Promiser and a Co-defendant.

This objection is to be gathered from the evidence. As to the first objection, no decision, or even express dictum has been cited at the bar, or have I been able to find; nor indeed is it laid down in any of the text writers that the Bill or Note of an Infant must be considered void, on account of its negotiability. It is not essential to a promissory note that it should possess this quality, nor does that make it necessarily prejudicial to an Infant. It might indeed be a good ground for the Defendant's availing himself of his legal right, but I can see no good reason for saying, he shall not have the option to affirm it if he please, when he comes of age. When the subject has incidently come before the Courts, no such distinction as this has been drawn, and in some of the cases to which I shall refer as recognizing the defendant's liability, the securities appear to have been negotiable.

The expressions of Mr. Justice Ashurst in Cockshott *vs.* Bennett, 2, T. R. 766, and of Lord Ellenborough in Taylor, *vs.* Croker 4 Esp. 187, have already been noticed.

In Holmes *vs.* Blogg as reported in 1 B. Moore 468, Copley serj., in arguing on the effect of infants, contracts, contrasting such as require some act to disaffirm, with those which must be expressly affirmed, considers engagements such as Bills of Exchange and Promissory Notes, which expose the Infant to losses, capable of confirmation, by some positive act at full age. In Bishop *v.* Chambers 3 C. & P. 55, which was an action on a negotiable note, and the pleadings were precisely the same as in the present case, evidence having been given of an acknowledgment by the Defendant and a promise of payment, some objection arose to the Plaintiff's recovery by reason of an alteration appearing on the face of the note, and Denman of Counsel for the Plaintiff, was desirous that the whole case should be left to the jury; Lord Tenterden C. J. says—"I will ask the jury whether they they think the word *may* is in the same handwriting as the rest of the note, but the effect of the Defendant's admission *as answering the plea of infancy* and the plea of the Statute of Limitation is for the court and not for the jury." A verdict was found for the Defendant on account of the alteration, but so far from the promise being considered imperative by reason of the nature of the security, no objection was made on that ground, and a rule nisi for a new trial was granted on the question whether the admission of the Defendant was not sufficient, to entitle the Plaintiff to recover, on the account stated.

In Jeremy's analyt. Dig: 1834 p. 100, the case of Hunt *vs* Massey is abstracted from 3 Nev. and Man. 109 as follows—"Where after attaining full age, the party directed a third person to pay the amount of a Bill accepted during infancy, from funds in his hands held that it was not necessary to declare specially, and that the letter would be presumed to have been written on the day of its date."

The full report has not yet reached this country, but so far as we can judge from this short abstract, the affirmability of such a contract was not questioned.

The best text-writers on Bills of Exchange and Promissory Notes, viz. Mr. Justice Bayley and Mr. Chitty speak distinctly of such contracts, though made during infancy, becoming available by virtue of an express promise to pay. A very late author Mr. Byles in his Treatise on Bills,

though he speaks of Infants' Acceptances and Contracts made in the course of trade, as absolutely void, yet says "the moral obligation to fulfil them will support an express promise to pay, after he is of full age and before action brought."

There are cases also to shew, that the promise in order to be binding, must be voluntary, and with full knowledge of legal rights. The promise in the present case fully satisfies these requisitions, and I do not think, the Defendant can now avail himself of the objection to the nature of the Security, to avoid the promise he has so deliberately made.

The case of Cameron & al *v.* Smith, 2. B. & A. 305, is a sufficient answer to the second objection.—The note here is certainly made payable at a fixed day, which arrived before the Infant attained his majority, but no interest is expressed, and though in practice it has been customary to allow interest as a matter of course, after the day of payment, yet it appears clear, that such is not necessarily payable on an instrument in that form, but allowed by the Jury, only in the value of damages.—They are not bound to give it in every case, and in the present, none has been allowed.

As to the last objection, which does not appear on the face of the contract, but arises out of extrinsic evidence,—It has been argued, that although contracts of an uncertain nature as to benefit or injury may be affirmed, yet that the contract in the present case, was entered into under circumstances, which made it necessarily prejudical, and the Court seeing this, are bound to declare it wholly void.

By all the authorities it appears, that this is a question for the Court, and not for the Jury, and it may well be doubted, whether the rule is not confined to those cases in which the objection appears on the face of the instrument.

In Bacon's Abridg. vol. 4. p. 360, the rule is thus laid down—"That for the better security and protection of Infants, the Law has made some of their contracts absolutely void, *i. e.* all such in which there is no apparent benefit or semblance of benefit to the Infant;" but it is evident from the subsequent passage in the same Book in which the question whether the lease of an Infant not reserving rent be wholly void or not, is discussed, that no judicial determinations had gone to the full extent of the above rule; and many sound reasons are given for holding it even for the Infant's benefit, that he should be allowed when he comes of age, and is capable of considering over again what he has done, either to ratify and affirm his contracts, or to break through and avoid them.—This power being a sufficient protection to him against imposition, and the full exercise of it, being essential to his freedom of judging for himself.

From the language of Lord Raymond in the well known case of Holt *v.* Ward, Strange 969, cited and relied on by Mr. J. Dampier in 2 M. & S. 210, the Infant has equally the power of affirming the contract whether it turn out to his prejudice or to his benefit—and from the manner in which Lord Ellenborough expresses himself in the case of Baylis *v.* Dineley, 3 M. & S. 481, it would appear that he considered the face of the instrument as that which was to govern the Court, and it is to be remembered in using these qualified terms he refers to the words of Eyre, C. J. in Keans *v.* Boycot, 2 H. Bl. 515, which would admit of a broader construction.

The language of Best, J. as just cited, by Mr. Justice Carter, is similar to that of Lord Ellenborough, and I think affords the safest rule for us to go by.

Taking the whole matter into consideration, I am not disposed to carry the doctrine of void contracts more beyond the decided cases than it has been extended by this rule in its qualified terms, and there being nothing

more in the present instrument than the ordinary words of a Promissory Note, I think we may, without touching on any of the standing cases, or violating any principle necessarily deducible therefrom, treat it as the security of the Defendant, which he might by his promise at full age, render himself liable to pay; and in this view of the case I do not feel bound to say what ought to be our decision, had it appeared on the face of the note, that the Infant Defendant merely signed it as security; or whether considering the relative situation of the two Defendants, and the nature of the consideration, the transaction was attended with no benefit or semblance of benefit to the Infant.

It was clearly a Note for a fair and valuable consideration; the affirmance of it at full age was voluntary and deliberate—it recognized the consideration; it was made with a full knowledge of legal rights, and contained a positive promise of payment, by which I think the Defendant must be bound, and that the rule for entering a non-suit should be discharged.

Fisher for Plaintiff.

Wilmot for Defendant.

THE QUEBEC AND HALIFAX STEAM NAVIGATION COMPANY *v.* CUNARD & ALLEN.

This was an action of assumpsit for Money had received, Plea General Issue, tried before *Botsford, J.* at the Northumberland Circuit in 1834. Verdict for Defendants.

It appeared in evidence, that the Defendants were appointed agents at Miramichi by the subscribers to the above-named company resident there, previous to the incorporation of the Company to collect, receive, and remit, the amounts of the several shares to Quebec, where the same were required to be paid, the number of shares at Miramichi was at first 97, whereof 6 were abandoned, of the remaining 91, some paid the first Instalment to the Defendants, others remitted the money to Quebec, and some jointly gave Defendants Bills on Quebec, for the aggregate amounts due from them; part of the subsequent instalments were paid in like manner, the Defendants took promissory notes from several expressed payable to them "agents for the Quebec and Halifax steam Boat company," at specified periods, "with such sum in addition as might be necessary to make good the remittance to Quebec;" some of these were paid, others remained unpaid, and were handed over subsequently to Plaintiff's solicitor.

When the Company commenced business, the Defendants were their Agents at Miramichi, and settled the disbursements there of the Company's Steam Vessel, for which services they charged commission and rendered accounts stating the same at each voyage. A settlement between Plaintiffs' agent from Quebec and the Defendants, was made on 15th Oct. 1833, at which time the Defendants rendered an account current in which was the following item.

"Agency and compensation for trouble in attending to the business of the Association on 91 shares, at £25 each £2,275 at 5 per cent—£113 15s."

The account was settled except this item which was reserved for future consideration, and this action was brought to recover the amount so retained.

At the Trial Evidence was admitted of the Defendant's services as the general Agents of the Company, and the Defendants claimed to retain the amount as a compensation for their services generally rendered to Plaintiffs. His Honor left it to the Jury to consider if the Defendants were the agents of Plaintiffs, but did not distinguish between their capacities as agents for the Plaintiff and agents for shareholders.

In Michaelmas Term, a rule nisi was obtained, to set aside the verdict and grant a new trial on the following grounds:—

1st—The admission of improper evidence on the part of Defendants.

2d—The misdirection of his Honor the Judge.

3d—That the verdict was against evidence. The points were argued in Hilary Term, and stood over for the opinion of the Court until this Term.

Chipman, Chief Justice.—The question in dispute between the Parties in this cause, turned upon the right of the Defendants to retain the sum of £113 15s. mentioned in the account stated by them on 15th October 1833.

The shares mentioned in this charge it appears from other evidence were the shares in the capital stock of the Quebec and Halifax Steam Navigation Company, (the Plaintiff in the cause) that had been subscribed by Persons at Miramichi, which shares so subscribed amounted to the number of 91.

An obvious remark upon this charge upon the first reading of it in the manner in which it is framed, is that there seems to be neither justice nor propriety in making the compensation for trouble in attending to the business, that is, the general business of the Association after it was formed, to be rated by a per centage on a certain number of Shares which contributed to form it, especially as it appeared from other accounts, which were given in evidence that the Defendants uniformly charged, and were allowed a commission on all their receipts and disbursements in attending to the business of the Association, [after its business commenced] at Miramichi. These commissions, thus charged and allowed, must be considered as the compensation, for attending to the business of the Association after it went into operation.

There can be no propriety in charging a per centage, on the specific charges subscribed at Miramichi, unless it be for Agency in collecting the amount of those shares, and remitting the same to Quebec. And here arises the question whose agents were the Defendants in performing this service. Their appointment as agents took place at a meeting of the Subscribers at Miramichi on the 12th October, 1830, more than five months before the act of Incorporation of the Company, and they were at that meeting elected by such subscribers by ballot.

Their duty under this appointment appears in the minute of a previous meeting of these subscribers on the 8th October which declares the object of the meeting which was to be held on the 12th, to be "that of "appointing an Agent to the Shareholders in Miramichi, whose business "it shall be to receive the Instalments now due, and to take notes in his "own name for the balance and to transmit the sum when collected, to "the Treasurer at Quebec, pursuant to the resolution of the Quebec "Committee." It appears from the evidence of W. Stevenson that the resolutions of the Quebec Committee required "£25 net per share free of all deductions to be paid in Quebec."

At the above mentioned meeting on the 12th October, it was resolved "that the Miramichi Shareholders should not be liable for any more than "the sum of £25 for each Share subscribed, *except any loss or exchange "in remitting to Quebec.*"

The Notes given by the Miramichi subscribers for their respective balances were in the following terms, "being balance due by me for—shares in the Quebec and Halifax Steam Boat Company, with such sum in "addition as may be necessary to make good the remittance to Quebec."

All these things shew incontestibly that it was the understanding and stipulation of the Miramichi Subscribers before the Incorporation of the

Company, that £25 per share without any deduction was to be paid into the hands of the Treasurer at Quebec. The act of incorporation passed on the 21st March, 1831, speaks the same language, for sec. 2 provides, that the shares shall be £25 each to be paid "into the hands of the Treasurer of the said Company;" indeed it is evident that any deduction from the amount of the shares paid at Quebec would have been pro tanto a diminution of the capital stock of the Company which it is obvious was inadmissible.

It is clear I think, that it was considered at the time the Agents were appointed, that the collecting the amount of the Shares at Miramichi, and remitting the same to Quebec, should be a gratuitous service on their part, so far as they should be called upon to perform it, for in many instances the Subscribers made their own remittances to Quebec. Nothing appears upon the proceedings of the meeting of the Miramichi Subscribers with regard to compensation for the service. Johnson in his testimony states, that nothing was said about commission at the time—that he was a candidate for the appointment of agent—that he expected if appointed agent for the Miramichi Subscribers he should be appointed General Agent for the Company in Miramichi, which was his sole object in seeking the former appointment.

The conduct of the Defendants themselves shews clearly that they did not consider themselves entitled to any compensation for this service of collecting and remitting the shares, at least from the Company: In several of their letters they enclose remittances for shares to Quebec, and say nothing about commissions; these remittances were made before the act of Incorporation: In June, 1831, they state an account with the Company after its Incorporation, and give credit for amount received on Shares, and charge a remittance for the full sum without making any charge or deduction for commission: In subsequent accounts they charge commission on receipts of freight, &c. and their disbursements for the Company, and still make no charge of commission on the shares; and it is not until their last account of 15th October, 1833, after a lapse of nearly three years, that they bring forward this claim, and it does appear to me that they are not upon any principle entitled to it.

It remains to apply this view of the case to the proceedings at the trial. It appears to me that these proceedings were much complicated and perplexed, and that the attention of the learned Judge was for the greater part of the time kept away from the true merits of the case by the Defendants withholding till a very late period of the Trial, the production of the account of the 15th October, 1831. I think that all the evidence which was given as to the trouble which the Defendants were put to in attending to the general business of the Company was entirely irrelevant to their claim for a commission on the amount of shares as developed in the account of 15th October, 1833, and was therefore inadmissible.

Moreover, the point that the Defendants were (in the business of collecting and remitting the shares) to be viewed entirely in their original character as Agents of the Miramichi Shareholders only, and therefore were not entitled to make any charge for this service against the Company, was not put by the learned Judge to the jury so distinctly, as upon full consideration I think the case required.

On these grounds I am of opinion, that the rule for a new Trial should be made absolute.

CARTER, J.—This was an action for money had and received by the Defendants to the use of the Plaintiffs, and the defence set up by the Defendants was that they were entitled to retain £113 15s. the sum in question as Commission at the rate of 5 per cent on the whole amount of 91 shares of £25 each which they were employed by the Company as

their Agents to collect. To establish this defence it would be necessary to shew two things : 1st, that these Defendants were the Agents of the Company for this purpose; and as such Agents were entitled to a commission of 5 per cent on the amount of shares received ; and 2dly, that this money claimed to be retained by the Defendants was part of the money received by them as such Agents on account of the 91 shares.

If there has been any difficulty in considering this case it seems to me to have arisen mainly if not entirely, from confusing the characters of the Defendants in the collection of the shares where their agency was confined to the 91 shares, and that in which they afterwards acted, when they attended generally to the concerns of the Company, by superintending all business connected with the Company and the Boat at Miramichi. From the evidence it seems to me quite clear, that at the time when the agency of the Defendants was confined to the 91 shares, they were not the Agents of the Plaintiffs. It is quite clear they were not originally appointed to act in that capacity by the Plaintiffs, and every thing which was proved respecting what took place at that time is perfectly consistent with the fact of their acting as Agents for the holders of the 91 shares, while the regulations of the Company, that the whole and complete amount of every share was to be remitted and made good at Quebec, is wholly inconsistent with the fact of their having appointed agents at Miramichi, who were to have a right to retain a certain proportion of each share. The fact too of the Defendants having rendered accounts in which commission is charged on disbursements made by them, and no commission is mentioned on the amount of shares received, shews very strongly that the Defendants themselves did not consider themselves entitled to such commission, but that this claim was an after-thought.

With respect to the 2d point I have mentioned, it is quite clear on the evidence, that supposing it had been established beyond doubt, that the Defendants were the agents of the Company for the collection of these 91 shares, and were as such entitled to 5 per cent commission on the amount of these shares, that the amount of £113 15s. for which the verdict now stands is far beyond the sum which was proved to be in their hands on amount of the 91 shares, and which alone they could in such case be entitled to retain.

From the confused and complicated manner in which the evidence in this case, most of it being wholly irrelevant, seems to have been produced, I think the attention of the learned Judge who tried this cause in his direction to the Jury, was not confined to the distinct and clear points on which the case turned, and therefore I am of opinion that the rule for a new trial should be made absolute.

PARKER, J.—I am quite of the same opinion; this case might indeed be decided on a very narrow ground, for supposing the Defendants to have been entitled to remuneration for their services from the Plaintiffs, they should have resorted to a set off, and not relied on a mere right to *retain* the balance in their hands.

There is no doubt that a right to reduce a Plaintiff's demand, or wholly to defeat it on account of some matter connected therewith, may in some cases be supported, and is distinct from a cross claim which is the subject matter of a set off or action; the right to retain for agency and commission is I think, properly exercisable only, on the specific monies received on the shares for which the charge is made, and could not be made on the general balance of accounts without some particular usage of trade or distinct agreement, neither of which existed in the present case. Remuneration for other services in the general business of the Company, has certainly no necessary connection with one part of the stock more than another ; and ought not to have been blended with the charge of agency on the Miramichi shares.

It may however, be more satisfactory to decide the case on the broader ground which the parties themselves have taken at the trial and argument: and this depends on the question, whether or no there was evidence to support the charge of per centage, for agency and compensation for trouble in attending to the business of the association on 91 shares in whole or in part; and on a careful consideration of all the facts, the time, nature and purpose of the Defendant's original appointment; the effect which such a charge would have in reducing the capital stock; the absence of any evidence from which it could be inferred that such was ever contemplated or sanctioned by the Company, or indeed that such was intended by the Defendants until the unfortunate progress and termination of the adventure made the Company's business less profitable than had been anticipated; I think the Jury were not warranted in the verdict they have found; but that the Plaintiffs were entitled to recover the sum of £113 15s. which the Defendants had received on their account, and that consequently the rule for a new trial must be made absolute.

Botsford J. concurred.

J. A. Street, Kerr, and Berton, for Plaintiffs.

S. Wetmore and Wilmot for Defendents.

JOHNSTON *v.* WINSLOW.

This was an action of Trespass, for seizing and carrying away Plaintiff's Timber; Plea the general issue.

At the Trial before *Chipman, C. J.* at the Carleton Circuit in Sept. 1834. The taking having been proved, the Defendant (who is Sheriff of Carleton) offered in Evidence an exemplification of a Judgment, and an alias writ of fieri facias thereupon issued against one Bishop ats Phillips, to whom it was offered to be proved, the property in question belonged; an objection was taken by the Solicitor General for Plaintiff, that the Writ offered was so altered and interlined, that it could not be received in evidence as a writ; after some discussion it was admitted, that the original writ of fieri facias had been returned by the Defendant, and had been altered by Mr. Hazen the Plaintiff's Attorney, and re-issued as an alias. His Honor determined that it was a void writ, and refused to receive it as evidence.

An exemplification of another judgment and execution, Banks against Bishop and another, was then offered, the execution so exemplified was indorsed, as received by the Sheriff 16th August, 1834, the trespass was committed in October, 1833, the Defendant's counsel offered evidence, to shew that there was a mistake either in the indorsement of the Writ, or the exemplification thereof, that the writ was in the Sheriff's hands at the time of the seizure, and that he levied under and by virtue thereof, but His Honor refused to admit any Evidence to contradict the record. Whereupon the Plaintiff obtained a verdict.

In Michaelmas Term, a rule nisi was obtained to set aside the verdict and grant a new trial, on the ground of the improper rejection of evidence at the trial.

Cause was shewn in Hilary Term by the *Solicitor General* and *Wilmot* for Plaintiff who contended, that the Sheriff having taken Goods out of the possession of a person not named in the writ, must shew, that the judgment and every proceeding down to the execution, and the writ itself were regular and correct, or he must be considered a mere wrong doer. As to the execution, Banks *v.* Bishop, the Sheriff's Indorsement shewed that he did not receive it, until after the Trespass was committed; and that indorsement being part of a record, could not be disputed.

Berton in support of the rule, as to the first writ, urged that a Sheriff

could only be required to take reasonable precaution; if he found on record a judgment, to warrant the execution, he could not determine what erasures or interlineations would vitiate the writ: it came to him under the seal of the Court, and knowing the property in question to belong to the Person against whom the Execution issued, he levied upon it; but even if there were an irregularity in the writ, he contended it was not sufficient to make it a void writ—and if only irregular, then it was a sufficient justification until set aside: as to the execution Banks v. Bishop, evidence was not offered to vitiate but to support a record:—by the Sheriff's Indorsement, it appeared that the Execution was received in his office in Aug. 1834, the writ was returnable in Hilary 1834, which was an absurdity; the evidence offered was to shew the mistake of 1834 for 1833, and that would have supported the writ, and have rendered it effective. He cited Dickson v. Fisher, 1 W. Bl. 664. Watson's Sheriff, 53, s. 4. 3 Wils. 345. 2 Burrow, 964. 15 East. 614, (d). 3 Bac. Abr. 419, 420.

Curia adv. vult.

The Court delivered Judgment at this Term.

Botsford, J.—I am of opinion that this rule must be discharged upon both grounds. The Writ of Fieri facias having been changed into an alias, by the interlineation of the words "as before we have commanded you,"—and by the alteration of the teste and return may be said to be destroyed, and the alias so called with such interlineations and alterations upon the face of it, and without having been resealed, must be considered as a nullity in the hands of the Sheriff.

With respect to the second ground, I think the case of Dickson and Fisher, 1 W. Bl. 664 is decisive, there it was held by the Court, "That Parol "evidence ought not to be admitted to vitiate the record, and prove it to "have been wrong, though it may have been admitted in order to pro-"nounce it right."

Carter J.—This was an action of Trespass against the Defendant for taking certain Timber alleged to be the Plaintiff's property. The defence was that Defendant as Sheriff of Carleton seized the Timber in question under two executions issued on judgments in two actions against a person named Bishop, and in support of this defence, two documents were offered in evidence;—the first which purported to be an alias fieri facias issued against Bishop, at the suit of Phillips, was admitted to be the original fieri facias, altered by erazures and interlineations into the form of an alias.

In the case of Pluchart v. Greenes, 2 Keble 705, Trespass was brought against a Sheriff and his Bailiff for false imprisonment, and they justified by warrant on writ to the Sheriff. Plaintiff replied,—no writ was then taken out, to which Defendant demurred, and judgment was given for the Plaintiff, for "albeit the Bailiff hath a warrant, yet he is liable if there be "no writ, contra if the writ be void, if delivered."

Now, can it be said in the case before the Court that there was any writ? In its original form it clearly was a writ of fieri facias; but in its altered form where it purports to be an alias, it seems to me to be nothing more than a piece of parchment issuing from an Attorney's office, and carries with it no authority as a writ. As well might the Attorney have made such alterations and interlineations as would have transformed it into a cap. ad sat., and offered it as a justification for the Sheriff in making an arrest.

The 2d document was an exemplification of a writ of fieri facias against Bishop at the suit of Banks, which appeared by the Sheriff's indorsement not to have been received till the 16th Aug. 1834, whereas the seizure which was the ground of this action took place in October, 1833. It was proposed to shew by the Sheriff's book, that the writ was in fact received

on the 16th Aug. 1833, but this evidence was rejected by His Honor the Chief Justice as tending to falsify a record.

I see nothing in this case to make it an exception to that which is well known as a rule of evidence, and which is distinctly recognized by Lord Kenyon in a case of Reed *v.* Jackson, 1 East. 357, where it was attempted to shew by other evidence that a verdict which had been entered generally, had been so entered by mistake of the officer, instead of having been entered on a particular plea. Lord Kenyon in his judgment, says, "The Evidence offered by the Defendant went to impeach the authenticity of a record, and therefore was inadmissible."

This case is a stronger one, inasmuch as the part of the record which is sought to be contradicted, is an entry made by the very person who now seeks to contradict it. I think His Honor the Chief Justice was right in refusing to admit the evidence offered in both cases, and that this rule must therefore be discharged.

PARKER, J.—I think, on both the points which have come before the Court in this case, the Chief Justice was right in rejecting the evidence offered at the trial.

As regards the first execution, had the question merely turned on the effect of erasures and interlineations, it would have been a matter of consideration whether they were in material parts, and at what time made; Crowther *v.* Wheat, 8 mod. 243—6 com. dig. 290; but when it appeared that what was produced as an *alias fieri facias*, had in fact been the original *fieri facias*, which had as such been already in the Sheriff's hands, I think it was properly treated as a nullity; and could no more warrant the Sheriff's proceeding, than if it had been a mere blank. In 2 Dowl. P. R. 745, a summons originally issued into Middlesex but altered to Surrey without resealing, was treated as a nullity.

This new doubt is a case of great hardship so far as the Sheriff is concerned, but if the Attorney has put into his hands to execute that which purported to be the writ of the Court but in fact is not, he must have his recourse on him.

The nature of the Sheriff's office exposes him to much risk; nothing perhaps more exemplifies this, than the decision in Lake *vs.* Billers, 1 L. R. 773, fully confirmed by Martin *v.* Podger, 5 Burr. 2631 and 2 Bl. 701, that in an action by third persons against the Sheriff for seizing goods under execution, he must not only shew a good execution; but a judgment to warrant it.

Another objection in the present case as strongly put by the Solicitor General, is that there is no original Execution remaining to warrant the award of an *alias*, but the first ground is I think sufficient.

With regard to the second Execution offered in evidence by the Defendant; I think the Indorsement made by the Sheriff of the time of receiving it, pursuant to the direction of the Provincial Statute of Frauds, 26, Geo. 3, c. 14, s. 13, was conclusive. To allow evidence at the trial on the part of the Sheriff to contradict this, would in effect render nugatory that which the Legislature has provided for the better manifestation of the time of the Executions coming into his hands. Besides in the present case the writ had actually been returned to the Court; and was with the Indorse-

ment thereon exemplified as a record, which on clear principles of Law, could not be contradicted by parol testimony.

Upon a proper application to this Court, shewing a mistake in the Indorsement, an amendment might, I conceive, have been allowed, 1 T. R. 782; and the Defendant, who must have been aware of the necessity of this evidence, should have applied before the trial to have the error, if such it were, corrected.

CHIPMAN, C. J.—I remain of the same opinion I expressed at the trial. The Sheriff in an action by a third person must shew himself right *in omnibus*. That which purported to be a writ was a nullity.

The 2d Writ was a record taken from the files of the Court, and exemplified under the Seal of the Court. I had no hesitation in rejecting evidence to contradict its contents. No evidence can be admitted to contradict a record. The Rule nisi must be discharged.

The Solicitor General and Wilmot for Plaintiff.

Dibblee, Wetmore and Berton for Defendant.

FOWLIE *vs.* STRONACH and ANOTHER, *Administrators of* English.

In this case a Rule Nisi was obtained in last Michaelmas Term, by *N. Parker and Wilmot* for Defendants, to set aside the Writ of Inquiry for the Assessment of Damages, and the return thereto, for defects and irregularities apparent on the face of them.

The Solicitor General and J. A. Street shewed cause in Hilary Term.

Cur. adv. vult. until this Term, when the Judgment of the Court was pronounced.

BOTSFORD, J.—It appears that a Writ of Inquiry for the Assessment of Damages was issued, directed to the Sheriff of the County of Northumberland, and to the Justices assigned to take the assizes in and for the said County, bearing date the twelfth day of July in the fifth year of His Majesty's reign, and returnable the second Tuesday in October then next following. That the Sheriff was commanded to summon a Jury to appear before the said Justices of Assize, who were commanded to certify the Inquisition: and it appears by the return that the Inquest was holden before the Justice of Assize who signed and certified the same.

It is contended by the Counsel for Defendants, that the Writ ought to have been directed to the Sheriff alone, who is the person designated by law to hold the Inquest—that the Judge at Nisi Prius is only an assistant to the Sheriff, by whom the return ought to have been made. The irregularity is admitted by the Counsel for the Plaintiff, but it is contended, that the same was waived by the Defendants, whose Counsel were present, and who attended on their behalf, before the Judge of Assize on the taking of the Inquisition, and by taking subsequent steps in giving notice of an intended motion to this Court to set aside the Inquisition, on the ground of improper rejection of Evidence by the Judge of Assize.

To this it is answered, that the proceedings are defective, and cannot be amended, cured, or waived.

With respect to the Writ of Inquiry and the Return thereto, I am of opinion that they are defective—that the Judge of Assize had no power, neither could he derive any, under the Writ of Inquiry— that he could only act as an Assistant to the Sheriff, agreeable to what is said by Holt, Chief Justice, in an anonymous case, (12 Mod. 610) "A Judge at Nisi Prius upon trial of a Writ of In-"quiry, is only an Assistant to the Sheriff, and has no Judicial "power." The Writ of Inquiry and proceedings under it being defective and not merely irregular, I am of opinion that they could not be waived by any of the steps taken by the Defendants. In Massey and Wilson, 5 T. R. 254, a distinction was taken between a mere irregularity in the mode or time of the proceedings, and a defect in the proceedings themselves, that the latter kind could not be waived by the adverse party, though the former might, and this distinction was allowed by the Court.

CARTER, J.—This was a motion to set aside a Writ of Inquiry, which had issued to assess damages (after Judgment on demurrer) and the Inquisition thereon, the action being in covenant on a lease. It appeared that the Writ was directed to the Judge of Assize and not to the Sheriff, and that it was executed before the Judge of Assize, and the Inquisition was under the hand and seal of the Judge of Assize—and that the Defendant appeared and made defence at the execution of the Writ. It is clear that the direction of this Writ was wrong, and that this was a case in which the Judge of Assize could not have power to take the Inquisition.

In considering this case, I have had considerable doubts whether this defect in the proceedings, was not one which should be taken advantage of by another method than a motion to set aside the proceedings; but on the whole, I am led to conclude that the whole proceedings under this Writ are not irregular only, but wholly defective, *ab initio*: and that therefore the subsequent steps taken by the Defendants, which would clearly have been a waiver of an irregularity, do not waive this, which is a complete defect in the proceedings.

On this ground, I think the rule should be made absolute.

PARKER, J.—I am quite of opinion that the Defendants in the present case, are not entitled to any favor from the Court, they appeared by their Counsel at the execution of the Writ of Inquiry; made no objection whatever to the form of the Writ or the proceeding thereon, went into their defence— it was moreover at their instance that the Judge of Assize was associated with the Sheriff; and under such circumstances all mere irregularities must be considered waived; and the Plaintiff is entitled to his judgment, unless the defect be of such a nature as to render the whole proceeding null and void. I would here observe that I do not agree with the learned Counsel for the Defendant in his position, that in all cases where defects are cured by the statutes of Jeoffails, the Court will, nevertheless, set the proceedings aside, if application be made

before they are upon the record. In all such cases the Court must exercise a sound discretion, and in one like the present should certainly not interfere to deprive the Plaintiff of any benefit which he might derive from those statutes. Indeed I am of opinion that the Court would, if the defect were amendable, allow the Plaintiff to amend, although he has made no direct application for leave so to do.

My reason for thinking the rule obtained in this case must be made absolute, is, that the defect is of such a nature as cannot be waived, and would not be aided by any of the statutes of amendment or Jeoffail; that if the Plaintiff proceeded to enter up his judgment it must be erroneous; that seeing this the Court will not allow him to incur useless trouble and expence, but in order that he may have his damages properly assessed, will set aside the Writ and Inquisition.

It is clear from all the authorities, that there is a great distinction between a defect in the proceedings and a mere irregularity; the latter may be waived, the former cannot be. Sell. Pr. 100. 5 T. R. 254, 4 T. R. 349: Mr. Sellon says, "The time of taking advantage of any irregularity depends on the nature of the defect, whether it be such as vitiates the proceedings *in toto* so as to render them null and void, or only such an irregularity as may be cured or waived by some subsequent act of the parties, for there is a distinction between a defect in the proceedings and a mere irregularity."

In 1 Dowl: P. R. 29, Mr. J. Taunton says, "there is this difference between an irregularity and a nullity,—an irregularity may be waived but a nullity cannot."

In the present case a Writ of Inquiry has issued, directed to the Sheriff, and the Judge of Assize, by which the Sheriff is directed to summon the Jury and the Judge to make the Inquiry, and return the Inquisition under his hand and seal. The action is covenant in which the damages are to be assessed in the ordinary way, and not debt on Bond with breeches assigned, for which a particular mode of Inquiry is appointed by statute. We are to determine whether the Writ and the proceedings thereon are a mere nullity or only an irregularity.

As a rule was obtained for having the Inquisition taken in presence of the Judge at the circuit, the first point for consideration is, whether that circumstance makes any difference in the nature of the proceedings on the record. It appears clearly from all the Books of practice, that the Writ and Inquisition are precisely the same, whether taken in presence of the Judge or not: The Sheriff is the officer in either case, in whom the judicial power is vested, and the Inquisition is returned under his hand and seal, and those of the jurors. In 12 Mod. 610, Holt, C. J., said, "a Judge of Nisi Prius upon trial of a Writ of Inquiry, is only an assistant to the Sheriff, and has no judicial power." In this Province the Judges sit at Nisi Prius under the act of Assembly, 26 Geo. 3, c. 8, by which they are empowered to try causes brought to issue in the Supreme Court. Any other power by them to be exercised on the

Circuit, must be derived from the established practice of the Court, or some special enactment.

The Sheriff, where he is not an interested person, is the known officer of the Court to whom the duty of Inquiry of the Damages in ordinary cases, as well as the execution of other Writs, must be assigned, and we have no power to substitute the Judge or any other person; we can no more I conceive award a Writ to the Judge to make the inquiry in ordinary cases, than we can authorise the Sheriff to do it under the stat. of Wm. 3d. relative to Bonds. The Sheriff under the Writ now before us was *functus officio* after returning the jury, if he appeared at the Inquisition, it was wholly without authority as the Writ gave him none: the Judge and not the Sheriff has the judicial authority by the Writ to swear the Jury and Witnesses, and he alone has made the return. I cannot but think the whole proceedings were *coram non judice*, and are consequently defective. In support of this opinion I find it laid down in 6 Com. Dig. 289, "If Writ of Inquiry be executed before him who has no authority, it is error as in an Inferior Court if it is directed to the Serjeant at Mace, and is executed before the Mayor who is Judge of the Court, Yelv. 69." In the case in Yelverton, the Court said, "An Inquiry before the Mayor is not warranted by any Writ, and by consequence judgment to recover such damages placed before a wrong officer is erroneous."

In Comyn, it is further said, "If a Writ of Inquiry is erroneous it shall not be amended, but the Plaintiff may have another writ."

In 2 Wils. 378,—An Inquisition taken before two under-Sheriffs extraordinary was set aside, the Court holding that the High Sheriff could appoint no more than one under Sheriff extra.

In Blakamore's case, 2 Rep. 310, it is held that misprision of a Clerk to be amended did not extend to a case where the Clerk mistakes the form of the Writ.

The case of Grant *vs.* Bagge, 3 East, 128, is important to shew that a Writ directed improperly to an officer not accustomed to receive such would be quashed on motion *quia improvide emanarit*, and would not justify the officer who took upon him to execute it.

In the Queen *vs.* Tuelein 1 Salk, 51, Lord C J. Holt and Powel & Powys J. say, that though a misawarding of Process on the roll might be amended at common law of the same term, because it was the act of the Court, yet if any Clerk at common law issued out an erroneous Process on a right award of the Court, that was never amended in any case at common law.

Some cases have been cited of Amendments in Jury process, such as the *distringas* and *veniri* after verdict; and it has been argued that the statutes of Jeoffail curing defects in substance as well as form, extend now to cases where judgment is given by default, confession or on demurrer, as well as those after verdict.

I have carefully examined the statutes of Jeoffail, and find that the position is not exactly correct; by stat. 4 & 5, Ann. c. 16, it is true all omissions or defects which were then cured after verdict were equally cured by judgments of confession, default, &c.; but it is not until the statute 5 Geo. 1, c. 13, that defects in sub-

stance in judicial Writs are aided; and this is expressly confined to cases after verdict. But independent of this statute, there is a great distinction between Writs of *venire*, &c. which do not convey the power under which the trial is had; and Writs of Inquiry which are the direct authority to the officer for his proceeding.

In Crowder *vs.* Rooke, 2 Wils. 144, where the cause was tried at a certain sitting, subsequent to that for which the nisi prius Record, &c. were made up, the Court considered the trial as *coram non judice*, refused leave to amend; but *ex officio* awarded a *venire de novo*.

Two cases have been cited from Strange's Reports, in one of which p. 878, it is said the want of a Writ of Inquiry is aided by the statute of Jeoffails; and the other P. 1077, where the Writ of Inquiry had been lost, and the Court made a rule for a new Writ and Inquisition from the Sheriff's notes. Both cases are very loosely reported, and the first contains no statement of the proceedings, nor does it inform us of the nature of the action, or how the damages were assessed, or the record made up. The last turned evidently on the ground that the proceedings had been regular, though the Writ and Inquisition were lost: and the only ground on which I can conceive the first to have been decided, is that the Court would presume that a Writ had issued, and that it was a proper Writ; but we can make no such presumption here as we have the defective Writ before us, and can presume no other.

In truth this is not the case of a mistake or misprision of the Clerk, but an intentional application of a Writ provided by statute for one purpose, to another, for which it is not warranted; I say intentional, for the Plaintiff's Counsel at first insisted that the Writ was proper for the purpose, and according to the latest book of practice, though he is now satisfied he was mistaken.

The rule to quash the Writ and Inquisition, must I think be made absolute, but without costs: If we do not so interfere what can the Plaintiff do? It is not a case in which the Court could assess the damages, for supposing that we have the power, which may be questioned, when the provision of the act 26 Geo. 3, c. 21, and the uniform practice in this Province are considered; the Plaintiff has not called on us to do this, but has resorted to a Writ of Inquiry. Can he award a proper Writ on his roll, and enter that which has issued; or can he enter a different Writ from that under which he has proceeded? I think not: if we discharged the present rule obtained at the Defendants' instance, the Plaintiff must himself ask it of us if he wishes to proceed. Were it necessary indeed the Court might I think *ex officio* award a new writ; but there is no occasion for that being done.

CHIPMAN, CHIEF JUSTICE.—I was not present at the argument, but I fully concur in the opinions expressed by their Honors.

A proceeding after default is necessary to inform the Court what amount of damages the Plaintiff has sustained by reason of the premises.

A particular statute has altered the common law in some proceedings therein especially mentioned; in those laws, everything

is mentioned to be done according to the form of the statute, and if that course is imported into other cases not specified in the statute, the statutes of Jeoffails will not cure the defect. The present proceeding is *coram non judice*, and must be set aside.

The SOLICITOR GENERAL and J. A. STREET for Plaintiff.

N. PARKER, WETMORE, and WILMOT, for Defendants.

WILMOT *v.* BABINO and CORNWALL.

The Solicitor General moved in last Easter Term, on behalf of the Defendants, for relief under the Insolvent Act; but after argument the Court dismissed the application (*vid. ante*). Notice was given to Plaintiff's Attorney of a further application at this Term; but copies of the affidavits to support same, were not delivered. The Solicitor General was about to call the attention of the Court to the former affidavits and to some further statements—*Sed*

Per curiam.

This must be entirely a new application, and it does appear convenient that we should pursue the practice which has been established of giving notice and communicating copies of all the Applicant's affidavits to the opposite party, that he may be prepared to answer them: the course has been not to grant a rule *nisi*, but to take the matter into consideration in the first instance.

BRAYDON *v.* MOREHOUSE.

BERTON moved to set aside Service of Process in this cause with costs, on the ground that the *Capias ad resp.* was addressed to the Sheriff of Carleton, and was served in the Parish of Queensbury in York County. He cited 1 Arch. 345, 8 T. R. 235; 1 M. & S. 442, & 4 M. & S 412, and 1 Arch. (Ch. Ed. 1835,) 520.

Rule nisi granted, which by consent of Wilmot for Plaintiff, was made absolute in the first instance.

DICKINSON *v.* KETCHUM.

Replevin for divers quantities of Timber.

Defendant pleaded as to part of the Timber, *non cepit*.

2d. As to another part, Property in himself.

3d. As to another part, *non cepit*.

4th. As to another part, Property in himself.

And 5th. As to another part, the same.

At the Trial before CHIPMAN, CHIEF JUSTICE, at the Carleton Circuit in September last, a Verdict was found, on the first issue for Defendants. On the 2d, as to part of the Timber therein mentioned for the Plaintiff, and as to the remainder for the Defendant. On the 3d and 4th. issues for the Defendants: and on the 5th for Plaintiff. A question thereupon arose as to who was entitled to the record, and which Party should recover costs.

The SOLICITOR GENERAL for Defendant obtained a Rule in Hi-

lary, to shew cause why the Postea should not be given to the Defendants. Cause was shewn at this Term by Wilmot for Plaintiff.

Per curiam.

Each party is entitled to costs on the issues determined in his favor, see 2 Bos & Puller, 368; as to taxing costs in replevin, see Luter, 1190, confirmed in 4 B. & A. 43. The Plaintiff having carried down the Record, let him have the Postea for one month to enter up the judgment, and after that time if Plaintiff shall neglect to do so, the Defendant may enter up the judgment.

Wilmot for Plaintiff.

Solicitor General and C. Wetmore for Defendant.

BATES *vs.* LYON.

This was an Action of Trespass *quare clausum fregit*, tried before *Parker, J.* at the King's Circuit, in January last. Verdict for Defendant.

The Plaintiff proceeded for two distinct Trespasses on different Grants of Land, viz.:—One on what is called the *Middle Land Grant*; the other in what is called the *Taylor and Underhill Grant*.

In Hilary Term, the *Solicitor General* obtained a rule *nisi* to set aside the Verdict, and grant a new trial on two grounds, viz.: That the Verdict was contrary to evidence as relating to the Middle Land Grant, and secondly to the charge of His Honor the Judge as related to the Taylor and Underhill Grant.

N. Parker, for Defendant, showed cause at this Term, and contended as to the first point, that there was conflicting testimony before the Jury, and therefore the Court would not interfere; and as to the second point, that the question was wholly of fact, and within the province of the Jury; and even were it otherwise, the damages sought to be recovered being trifling, was a sufficient reason for not disturbing the Verdict.

The *Solicitor General*, in support of the Rule, urged with regard to the Taylor and Underhill Grant, that although the Trespass was in itself of no great importance, yet as the object of the action was to try a question of boundary, and the Verdict would establish a right, the Court would on the second ground set aside the Verdict.

Chipman, Ch. J.—This Rule was obtained on two grounds; the first, that the Verdict was against Evidence, as to the Middle Land Grant, has been virtually abandoned by the Learned Counsel for the Plaintiff, and at any rate there was conflicting testimony before the Jury. On the second ground, with regard to the Taylor and Underhill Grant, we are urged to grant a new Trial, because it is said that the Verdict will establish a right.

On looking at the evidence as reported by Mr. Justice Parker, I am of opinion, that the Plaintiff has brought his cause into Court in a way that will not entitle him to a new Trial. He produced a Grant in evidence, called the Taylor and Underhill Grant, which specified certain bounds and courses. The next step on his part

should properly have been to give evidence of the bounds designated in that Grant, and if those could not be found, to have run lines according to the Grant; but instead of that he depended on another old line connected with another Grant. There is great uncertainty in the line as shown by the Plaintiff, and he clearly run the risk of that uncertainty, and the result is that the bounds still remain as uncertain as ever. I am therefore of opinion that the Plaintiff is not entitled to ask for a new Trial. If his rights should hereafter be invaded he can seek his legal remedy, and this Verdict cannot be evidence against him.

Botsford, J., and Carter, J., concurred.

Parker, J.—This was a question of fact, depending on an immense mass of evidence. Three days were occupied in the Trial, and in putting the Cause to the Jury I stated how I thought the cause should be considered.

The question is not if the Court agree with the Jury, but if the Jury had a right to determine as they have done. The Plaintiff came into Court in an extraordinary way. He offered a Grant, and evidence of bounds almost indefinite when he might have shewn definite bounds. The obscurity was the fault of the Plaintiff himself. He had the means of producing evidence to shew the true line of Boundary, but he rather depended on the uncertainty. I think the Jury came to a more correct decision than I did at the Trial, and I am not dissatisfied with the Verdict.

Rule discharged.

MICHAELMAS TERM,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

M'ILHANEY *vs.* WISWALL.

A Rule Nisi having been obtained in this cause, to deprive the Plaintiff of his costs, pursuant to the Act of Assembly, 50 G. 3, c. 17, s. 10, cause was shewn in last Trinity Term. The Court took time to look into the Cases, and at this Term, delivered their opinions.

CHIPMAN, CHIEF JUSTICE.

This was an action of Assumpsit, for work and labour, tried before Parker, J. at the St. John January Circuit, 1835.—Plea, General Issue.—Verdict for the Plaintiff for £3 4s. 6d.—The Plaintiff proved work done for more than six months as a carpenter, and the amount of his account therefor was about £30; it was proved that the Plaintiff had received sundry articles from the Defendant, under his order, which might be considered as payments, to a considerable amount; and that Plaintiff had acknowledged, after all these payments had been made, that he thought a balance of £7 or £8 only was due to him.

There was a notice of set off, but whether the evidence given by the Defendant, was as set off or payment, did not distinctly appear. There was no evidence to reduce the demand, below what the Plaintiff had stated was due to him, viz. £7 or £8, and it is not known upon what ground the Jury did go.

The clause of the Provincial statute, 50 G. 3, c. 17, s. 10, on which this application is founded, is in the following terms.—"If any action or suit shall be commenced in any other Court "than the Justices Court for any debt not exceeding the sum of "£5, and *recoverable by virtue of this Act in the Justices Court*, "then, and in every such case, the Plaintiff in such action or

"suit shall not by reason of a verdict or judgment for him, &c. "have or be entitled to any costs whatever." In order then to deprive the Plaintiff of costs under this Act, it is essential, that the debt *for which the action is brought* shall not exceed the sum of £5, and shall be recoverable in the Justices Court. If the original debt be reduced by a set off, it is clear and has always been held, that it could not have been sued for in the inferior jurisdiction, and the Act does not apply; and it is only in case this evidence should be considered as evidence of payment, and not of set off, that this application can for a moment be sustained; in this view of the matter it may indeed be considered to be settled as a *general rule*, that the verdict shall be taken as *the evidence* of the amount for which the action is brought.

Fitzpatrick *vs.* Pickering, 2 Wils, 68.
Shaddick *vs.* Bennett, 4 Barn and Cres. 769.
Drew *vs.* Coles, 2 Tyr. 503. 2 C. & J. 505. 1 Dowl.P. C. 580.
Jones *vs.* Harris, 1 Dowl, Pr. Ca. 433.
Baddley *vs.* Oliver, 1 Dowl. P. C. 598. 1 C. & M. 219.
Moore *vs.* Jones, 2 Dowl. Pr. Ca. 58.

Nevertheless, it is only as *evidence* of the amount of the original debt rightfully due, that the verdict is to be received, and it is not conclusively binding on the Court in all cases, to deprive the Plaintiff of his costs, when found for the Plaintiff for a sum, which is within the Justices jurisdiction; accordingly in Drew *vs.* Coles, Lord Chief Baron Lyndhurst says, "It is not "necessary to say that in every case the verdict shall rule "as to the amount of the debt due to the Plaintiff which might "have been rightfully demanded by him, but there is no doubt "that in the generality of cases it shall decide the question;" and Baron Bayley says, "*prima facie*, a verdict is to be taken, "as evidence of what the debt was, when the action was com- "menced." In any case therefore, when the original debt *proved at the trial* shall exceed five pounds, and the Jury shall think fit to bring in their verdict in respect of that debt, for a sum under five pounds, and without there being a foundation in the evidence given at the trial, for so reducing it, I do not consider that the Court is bound to receive the verdict, as such conclusive evidence of the debt originally due, as to deprive the Plaintiff of his costs under the Act.

The case most analogous in its circumstances to the present, is that of Harsant *vs.* Larkin, 3 B. and B. 257. In this case the action was brought for measured work and labour, which a surveyor of the Defendant's own appointment, had estimated at upwards of £34, and upon this estimate, the balance proved to

be due the Plaintiff was more than £9; the Jury however, in a manner unaccountable to the Court, reduced the estimate to £26, and thereby reduced the balance due to the Plaintiff to £1 2s., for which last mentioned sum they gave their verdict, and the Court, under these circumstances, refused to deprive the Plaintiff of his costs.

Now, although the doctrine broadly laid down in Harsant *vs.* Larkin, as to the discretion of the Court in these cases, must be considered as very much limited by subsequent decisions, yet the decision itself under the peculiar circumstances of the case, has never been questioned, and I think affords a precedent, for the determination of the present case under its peculiar circumstances. The Plaintiff in the present case had an original demand which was proved, of £30; this demand had indeed been reduced, and in the view I am now taking, let it be supposed that it was reduced by payments, yet there was no evidence of a reduction below £7.—Under these circumstances the Plaintiff surely could not bring his action in the Justices Court for a sum under £5.

This case differs entirely from that of Dickinson *vs.* Balloch, *(ante p.* 11) formerly decided in this Court. In Dickinson *vs.* Balloch, the Plaintiff had a distinct demand, amounting only to 25*s.*, for which sum the verdict was given, and although a large demand had been litigated at the trial, yet it was evident that if this larger demand only, had been in question, the verdict would have been for the Defendant, and that the verdict was found for the Plaintiff, only for the *separate demand*, of £1 5s., which separate demand might have been sued for in the Justices Court.

The decision of this case is not of much moment as a precedent, as the late Act for the recovery of Small Debts, 4 W. 4, c. 45, makes improved and more complete regulations on the subject, the present rule for entering a suggestion must, I think, be discharged.

Botsford, J.—I fully concur in opinion with His Honor the Chief Justice. I am very much governed by the case of Moore *vs.* Jones, in 2d Dowl. Pr. Ca. 58; although the items proved on the part of the Defendant might have been in the nature of payments, yet having been treated as set off by the Defendant himself, he is not now entitled to consider the Plaintiff's demand as reduced by payments; and at any rate it was not reduced below £5, and therefore was not a demand recoverable in the Justices Court.

Carter, J.—I am of opinion that in this case no suggestion should be entered.

In cases of this description it seems very difficult, if not impossible, to lay down any general rule which may govern all cases :—The question to be decided is whether this was an action brought to recover a debt not exceeding 5*l.*, and in order to determine this we must consider how far the debt for which the action is brought is ascertained by the sum which is actually recovered by the verdict.

If, in all cases, the Court can only look to the verdict to ascertain the amount of the debt, and are bound by that, it would seem that this might become a motion of course, on an affidavit stating the nature of the action, and the amount of the verdict; that this is not so, the numerous cases and arguments to be found in the reports of the English Courts plainly shew, and if not so, it would then seem that each case must rest on its own circumstances, and that there is a discretion left to the Court, to take the circumstances of each case into consideration, to look at the evidence on which the verdict was founded, and the verdict itself, and then to decide the question on all these considerations jointly, and not by looking to the verdict, and to that alone. The language used by Chief Justice Abbott in *Shaddick* vs. *Bennett*, certainly goes very far to the conclusion that the debt for which the action is brought is to be ascertained by the sum which is recovered by the verdict; but referring that language to the circumstances of the case, then under the consideration of the Court, it seems that there was no doubt as to the amount of the debt, or the facts of the case, but the only point was, whether a debt, barred by the statute of limitations, was to be taken to be the debt, for which the action was brought, or the sum admitted to be due in the acknowledgment produced, to take the case out of the statute. No doubt existed in the mind of the Court as to the propriety and justice of the verdict on the law and evidence of the case, and under such circumstances there can be no doubt that the debt is to be ascertained by the amount of the verdict.

So in *Younger* vs. *Kilsby*, (6 Taun. 452.) *Chief Justice Gibbs* says, "The debt is that which is found by the verdict," but it does not appear that there was any reason to doubt the propriety of the verdict in that case.

In *Tucker* vs. *Crosby*, 2 Taun. 169, the ground on which the Court give judgment, is *that the verdict was right*, which expression clearly shows that the Court conceived it within their discretion to consider the propriety of the verdict on the law and evidence of the case.

The language of *Lord Ellenborough* in *Horn* vs. *Hughes*, (8 East. 317,) leads to the conclusion that in the opinion of that very learned Judge the verdict was not in all cases conclusive,

as to the debt for which the action was brought; for he says, "It is unnecessary to say what we might have thought, if it had "appeared that the Plaintiff had a reasonable ground for bring- "ing his action, for more than five pounds, but that from the "absence of a material witness, or *other cause*, without his de- "fault, he had failed in proving his whole demand; but here it "appears," (*i. e.* to the Court, as well as the Jury,) "that less "than that sum was due at the time of bringing the action, by "means of a part payment, of which he must have been cogni- "zant." This therefore was a case in which there appeared to the Court no reason to be dissatisfied with the verdict of the Jury.

I come now to the case of *Harsant* vs. *Larkin*. In that case the action was brought for £34 5s. 1d., a sum fixed as the value of work done by Plaintiff for the Defendant, by a surveyor appointed by both parties; the Defendant proved payments on account, amounting to £24 18s., but the Jury forming a lower estimate of the work, found a verdict for £1 2s., instead of £9 and upwards, which would have been the balance, taking the surveyor's valuation; there the Court took all the circumstances of the case into consideration, and decided that it was not a case which ought to have been submitted to an inferior Court, and therefore refused the application. The language of *Justice J. Burrough* seems to me very applicable to the case now under consideration. He says, "in all cases much "must be left to the discretion of the Court upon the facts as "they appear in evidence; the intention of the Legislature was, "that the suggestion as to costs, should be applied to cases "where there was a clear demand for less than forty shillings; "but if we look at the facts of this case, we can have no doubt "that it is not one of that description; here is a demand for "more than £34, a valuation by consent of both parties, a ba- "lance struck, particulars of demand given, and the valuer cal- "led, and though for some reason to us unknown, the Jury have "found a verdict for less than the balance, I am satisfied on "the merits of this case, that it is not within the Act."

The principle laid down in this case has not been overruled by any subsequent case, for in *Drew* vs. *Coles*, in which this question was fully argued, *Lord Lyndhurst* carefully abstains from saying that in all cases the verdict of the Jury should be the criterion of the debt justly due, and he also says, that "in the case then before the Court, *in a conflict of tes-* "*timony*, the Jury decided that the Plaintiff was only entitled "to a sum under £5, which sum he could only rightfully de- "mand." In the same case, *Justice B. Bayley* says, "*prima* "*facie* the verdict of a Jury is the estimate of what is the just

"debt due between the parties at the period when the action "was commenced," and he further says, "if the Court could "exercise a discretionary power in *ordinary* cases of this kind, "*this* is not in my opinion a case in which such a discretionary "power ought to be exercised." *Justice B. Holland* expressly says, that the judgment of the Court in that case will in no way trench upon the decision in Harsant *vs.* Larkin.

The result to which a careful consideration of all the cases leads me, is, that the Court are not finally and universally concluded by the verdict of the Jury, as to the amount of the debt, though I am quite of opinion that the discretion which rests with the Court, should be very cautiously exercised. Looking to the facts of the present case as they appeared in evidence, it seems that the original debt proved by the Plaintiff amounted to between £20 and £30, but that by his own admission, it had been reduced to about £7 or £8. The Defendant proved payments or delivery of goods in lieu of payment to the amount of only £5 or £6, and the learned Judge who tried the cause told the Jury, that as the balance made by deducting the amount proved by the Defendant from the original debt would be larger than that admitted by the Plaintiff to be the real balance due, they had better take the latter amount for their verdict; the Jury however found a verdict which can be explained by neither mode of calculation, viz. for £3 4s. 6d.

Upon these facts as they appear in evidence, though the Jury have found a verdict for only £3 4s. 6d. (an amount which it seems impossible to explain by any construction of the evidence,) I must say I am satisfied that this is not a case in which the Court should feel themselves prevented by the amount of the verdict so found, from refusing to allow the proposed suggestion, which I am satisfied is not called for by the merits of the case.

PARKER, J.—I agree with the opinion expressed by His Honor the Chief Justice and my brethren. I think we may decide this case without trenching on decisions either at home or here.

The Plaintiff proved between £20 and £30; the Defendant gave notice of set off, and proved items which perhaps might have been payments, but were given under set off, and it was not made a distinct point that they were as payments, and he put a witness on the stand to prove the Plaintiff's admission that only £7 or £8 was due to him. The Plaintiff ought not to be deprived of costs unless he has sued for a demand recoverable in a Justice's Court. Now, if the verdict is binding on the Court as to the amount of the debt due, this application, (as has been remarked) would be a motion of course, but in all the cases, the Courts have looked at the circumstances and consider-

ed them, and if they have a right to do so, then there can be no doubt that in this case the rule should be discharged.

Lugrin and *Wilmot* for the Plaintiff.

R. L. Hazen and *R. Sands* for the Defendant.

CAMPBELL, SHERIFF OF CHARLOTTE, *vs.* WILLIAM HENAN, MORRISON, O'NEIL, FARREL, and THOS HENAN.

This was an action of debt on a Bond made to the Plaintiff by the Defendants, conditioned for William Henan, one of the Defendants, then a prisoner in the Plaintiff's custody, continuing within the limits of the gaol of Charlotte County.

Thomas Henan was not brought into Court.

The Declaration contained only one Count on the Bond.

The Defendants, William Henan, Morrison, O'Neil, and Farrell craved Oyer, and set forth the condition of the Bond, which was as follows, viz. : "Whereas the above-named Colin "Campbell, Sheriff as aforesaid, hath given permission to the "above bounden William Henan, a debtor confined in the gaol "of the County abovementioned, to go about and have his li- "berty, within the yard or limits of such gaol ; Now the con- "dition of this obligation is such, that if the said William Henan "shall not go or be at large, out of the said limits of such gaol, "or escape at any time *while he has the liberty of the same*, then, "&c." being in the form prescribed by the Act, 10 and 11 G. 4, c. 30, s. 18, and pleaded, 1st. Non est factum ; 2d. Actio non, &c., because that after the making, &c., and while the said William Henan had the liberty of the said limits of the said gaol as in the said condition is mentioned, to-wit, on, &c., at, &c., the said Morrison, O'Neil, and Farrell took the said William Henan to the said gaol of the said County of Charlotte, and then and there surrendered and delivered him up to the custody of the Plaintiff as such Sheriff as aforesaid, in discharge of the said writing obligatory, and their liability thereon, *and the said Plaintiff as such Sheriff as aforesaid, then and there, received and took the said William Henan into his custody, as such Sheriff, in discharge of the said Morrison, O'Neil, and Farrell, and committed him to the said gaol of the said County of Charlotte, and there kept and detained him for a long space of time*, to-wit, for the space of two days. And the said Plaintiff afterwards, to-wit, on, &c., without the consent or leave of the said Morrison, O'Neil, and Farrell, discharged and set at liberty the said William Henan.

3d. That after the making, &c., to-wit, on, &c., at, &c., the said William Henan surrendered and yielded himself to the

Plaintiff, as such Sheriff as aforesaid, in discharge of the said writing obligatory, *and the said Plaintiff as such Sheriff then and there received and took the said William Henan into his custody*, and afterwards on, &c., at, &c., suffered and permitted the said William Henan to go and be at large, &c.

4th. That the said William Henan did not go nor was at large, out of the limits of, &c., nor did he escape at any time while he had the liberty of the same.

5th. That the Plaintiff hath not at any time since the making of, &c., hitherto been in anywise damnified; nor hath he sustained any damage by reason of the said William Henan going at large out of the limits of the said gaol.

The Plaintiff demurred generally to the second, third, and fifth pleas, and took issue upon the first and fourth. The Defendants joined in Demurrer.

Chandler in support of the Demurrer.

The Bond declared upon is under the Provincial Act, 10 and 11 G. 4, c. 30, the 11th sect. of which empowers the Justices of the Peace to designate certain limits to the gaol yards; by the 19th sect. the Sheriff is empowered to permit prisoners to have their liberty within such limits upon a Bond being given to the Sheriff, conditioned that the prisoner shall not be at large or escape, &c.

The second and third pleas can only be sustained on the principle that the Defendants were in the same condition, as principal and special bail, and that the bail for the limits under the said Act have a power of render, which is not the case. The power which formerly was given to the Sheriff by 6 G. 4, c. 10, upon reasonable cause to revoke the permission to prisoners to go about within the limits, and renew it if he thought fit, is cancelled by 10 and 11 G. 4. c. 30, which contains no such provision. It would be an Act of Trespass on the part of the sureties, to take the principal for the purpose of surrendering him, as well as on the part of the Sheriff to receive or detain him when so surrendered. The effect therefore of sustaining the Pleas in question would be to establish that the illegal conduct of the parties is a sufficient answer to the action.

(Botsford, J.—Is it not alleged that the Sheriff received him back.) If the Bail had no right to render, it would follow that the principal had no right to render himself, and that the Sheriff had no right to receive him, or if he did, and the Prisoner applied for his discharge, the Sheriff would have been a trespasser by detaining him. The only available defence would be to show a discharge by some instrument, or by some act tantamount thereto, on the principle eo ligamine quo ligatur, dissolvetur.

As to the 5th plea, non damificatus, it is clearly bad upon the authority of *Holmes and another* vs. *Rhodes*, 1 B. & P. 638, and 1 Saun. Rep. 117, Note 1. There is also a discretionary power vested in the Court to extend relief to the bail in such cases as they may think proper.

The *Solicitor General* contra. If the construction of the Act were as contended for by the Plaintiff's counsel, it would render the Act of Assembly in a great measure nugatory, as it would be impossible for many debtors to obtain security for the limits, if (having obtained it) they were at once placed beyond the control, either of their sureties or the Sheriff. But the fair construction of the Act and the form of the Bond contradict the position; the party shall not escape, "while he has the liberty," and the Sheriff "is authorised and empowered to permit," &c., neither the words may or shall are used, but the Sheriff is merely empowered to permit debtors to go about within the limits; and while there they are in the eye of the Law as much in custody as if within the prison walls; and it cannot be contended therefore, that the Sheriff has no controul over them.

A debtor is not discharged as he would be on a Bail Bond being given, when he is entirely at large; but even in that case if he should deliver himself up before the return of the Writ, he would be in custody in the same manner as if he had not been at large.

The second and third Pleas are a full answer to the action, the Defendants, (and one of them the very debtor himself,) plead that the debtor was delivered up to the Sheriff, and received, taken and detained by him in custody. Now the condition of the Bond is, that the debtor shall not escape while he has the liberty of the limits; the pleas aver that he escaped while in close custody after his surrender; how then can the Sheriff after receiving and detaining the debtor as stated, and after either a negligent or wilful escape, turn round upon the Bail.

Bonds may be discharged by things equivalent to performance, as here, by rendering up the debtor, although a question might have arisen if the Sheriff had refused to receive him. In *Hotham* vs. *The East India Company*, 1 T. R. 638, *Buller, J.* says, "If an act undertaken to be done is dispensed with by "the other party, it is sufficient to state it on the Record."

As to the 5th Plea, no action is contemplated by the Act, to be brought by the Sheriff unless he has sustained an injury. If a debtor escape, he may assign the Bond to the Plaintiff at whose suit he was confined, or else it stands in effect an indemnity to him against any loss or damage by reason thereof.

(CHIPMAN, CHIEF JUSTICE. The Bond is given by the law, and if forfeited, why should not the Sheriff sue on it; it only

protects the Sheriff for enlarging the walls of the gaol.) The Bond is intended as a guard to the Sheriff in respect of damages, he is entitled to the amount of any damages he may have sustained, and no more under the statute; then what is the quantum of damages the Plaintiff in this case is entitled to recover. The Bond is in effect an indemnity bond.

CHIPMAN, CHIEF JUSTICE.—This is an action of Debt on a Bond commonly called a Limit Bond, given by the Defendants to the Plaintiff as Sheriff of the County of Charlotte, under the Act of Assembly, 10 and 11 G. 4, c. 30, s. 13, (after recapitulating the pleadings as before stated, His Honor continued,) this Demurrer has been argued during the present term, and now stands for judgment:—With regard to the second and third pleas which may be considered together, it is not necsesary for the decision of this case to determine, either on the one hand, whether the Sheriff after having given a party the liberty of the gaol limits upon the requisite bond being entered into, may, against the will of the party, replace him in close custody within the walls of the gaol, nor on the other hand, whether the party himself or his bail, may, against the will of the Sheriff, make a surrender into such close custody. The essential allegation in both these Pleas is, "*that the Sheriff received the Debtor*," when so re-delivered to close custody, as stated in the second plea upon a render by the sureties, and as stated in the third plea, upon a render by the debtor himself.

Being then delivered up, and received into close custody again, the operation of the Limit Bond necessarily ceased, for this bond by the express tenor of the condition, was only to be in force while the party had the liberty of the gaol limits. Upon this single and short ground, I am of opinion that there must be judgment for the Defendants on the second and third pleas.

Upon the Demurrer to the fifth plea, I am of opinion there must be judgment for the Plaintiff. The Plea is no answer to the condition of the Bond; it admits that the condition of the Bond has not been complied with, and alleges that the Plaintiff hath sustained no damage thereby. *Non damnificatus* is a good plea only when the condition of a bond is *merely to indemnify*.

When the condition of a Bond is for the fulfilment or performance of any particular thing, and not merely to save the Plaintiff from any damage by reason of such thing the Defendant must set forth specially the performance of the condition,

BOTSFORD, J.—I shall forbear to give an opinion as to the fifth plea, but as to the second and third pleas, I am satisfied

they contain a full and sufficient answer to the condition of the Bond, and therefore upon those pleas the Defendant is entitled to judgment.

CARTER, J.—I am also of opinion that there is sufficient in the second and third pleas to answer the condition of the Bond.

When the escape took place the Defendant had not his liberty within the gaol limits, and the condition of the Bond was only that he should not escape while he had such liberty.

Without deciding the question on a render by the sureties, or by the debtor himself, or their right to make such render, or upon a taking into close custody by the Sheriff against the will of the debtor, it is sufficient to determine this case that the Sheriff received the debtor and had him in close custody.

There is also a further allegation in the second plea, upon which it is not now necessary to decide; but it might have been argued that the escape took place by the sufferance and permission of the Sheriff.

As to the 5th Plea, I had considerable doubts, but have now a strong opinion that the plea is insufficient.

PARKER, J.—I quite agree in opinion with the rest of the Court. The fact as substantially set out in both the second and the third pleas, "that the debtor was rendered to, and received by the Sheriff in the gaol, and kept there in discharge of the Bond until released by him," is, I think, a sufficient answer to the action of the Sheriff thereon.

The demurrer to the 5th Plea is, in my opinion sustainable. *Non damnificatus* is a good Plea to an action on a Bond only where the condition is specifically for indemnity, for in that case it denies that the condition has been broken—Carthew 374, and 5 Mod. 243. In the present case the plea admits a breach of the condition.

It must be remarked that the form of the Limit Bond has been prescribed by the Legislature who would have given a different one, or might specially have authorised the plea of *non damnificatus*, had they intended that the Bond should not be available to the Sheriff until he had actually sustained damage himself in consequence of the debtor going at large.

Judgment for Defendant on the Second and Third Pleas.

J. W. Chandler for Plaintiff.

The *Solicitor General* and *A. L.* and *G. D. Street* for Defendants.

ELLIS *vs.* NEWTON.

F. A. Kinnear in last Trinity Term, obtained a rule nisi to set aside a Judgment as in case of a Nonsuit in this cause for surprize, the Rule was served on the Defendant's Attorney on 31st August.

D. L. Robinson now shewed cause on Affidavit.

PER CURIAM.

The Rule must be discharged; the facts are differently stated in the affidavits, and in such cases the affidavit of the party shewing cause must prevail.

There was great Laches in not serving the Rule nisi at an earlier period.

GIBBS *vs.* DEVEBER.

A Rule Nisi for security for costs in this cause was obtained by *Wilmot* in last Trinity Term.

J. W. Chandler for Plaintiff shewed cause, 1st. on affidavits which stated that the Plaintiff's absence was only temporary.—Issue was joined in Trinity, 1834. The Plaintiff went to England in January, 1835, to seek evidence in the cause, and was shortly expected to return.

2d. The Defendant was too late in his application, having known of the Plaintiff's absence previous to last Easter Term.

Rule discharged.

JOHNSTON *vs.* BRANSFIELD.

The Plaintiff sued out two writs against Defendant, returnable in Hilary, 1835, one to York, the other to Carleton, both were indorsed on oath for the same amount. The Defendant was arrested in York in November, and immediately entered Special Bail, of which notice was given to the Plaintiff's Attorney. In December he was arrested in Carleton, and again entered Special Bail, of which notice was also given. The Plaintiff's Attorney then apprized the Defendant's Attorney that *there was but one cause of action* and expressed his intention to discontinue on the 2d Writ. In June a Declaration was filed, but the 2d Recognizance remaining in force, the Defendant afterwards signed a Judgment of Non. Pros.

Wilmot for Plaintiff in Trinity Term obtained a Rule Nisi to set aside the Judgment for irregularity, a Declaration having been filed in the cause previous to the Judgment.

J. A. Street for Defendant, now showed cause, contending that the Judgment of Non. Pros. applied to the Writ which was set out in the record, and that there having been two arrests, it was not competent for the Plaintiff after the arrest made, and bail entered, to assert there was only one cause of action, and even if such were the case, a Judgment of Non. Pros. might be signed as to part of the action without affecting another part.—2 Ch. Arch. Pr. (1835,) 893, *Dordsy* vs. *Cook*, 4 B. and C. 135.

PER CURIAM.

The leading fact in this case is, that there is but one cause which has been put an end to by a Judgment of Non. Pros. which is irregular, a Declaration having been filed previous to the signing of the Judgment. It is competent for a Plaintiff to sue writs into different counties, and if in this cause there has been an irregularity, the Defendant has misconceived his remedy; he should have applied *to the Court for relief.* The Rule was made absolute without costs; and on the application of the defendant, it was further ordered, that an *exoneretur* should be entered on the Bail-piece last given, and that the Plaintiff should pay to the Defendant, his costs of entering such last mentioned Bail and appearance.

Wilmot for Plaintiff.

J. A. Street and *Berton* for Defendant.

CALIFF *vs.* WILSON.

Trespass for taking and carrying away Fish Nets, &c.

The Defendant pleaded—1st. The General Issue; and 2dly. justified the taking as an Overseer of the Fisheries, for that, the said net was set contrary to the provisions of the Act of Assembly, 8 G. 4, ch. 11, and avered that the said nets were not claimed within five days, and were thereupon sold as forfeited, pursuant to the said Act. Plaintiff replied, that the nets were claimed within the time limited, on which issue was joined.

The cause was tried at the August Circuit in Charlotte, and a verdict given for the Plaintiff.

J. W. Chandler for Defendant, moved for a Rule Nisi to set aside the verdict, and grant a new trial, on the ground that trespass was not sustainable, inasmuch as the original taking by the Defendant having been legal, there was not proved any such

subsequent Act as would make the Defendant a trespasser, ab initio.

CHIPMAN, CHIEF JUSTICE.—There were in this case two issues.—1st. The General Issue. 2d. That the Plaintiff did not appear to claim the Nets within the time limited by Law. Both these Issues have been found in favor of the Plaintiff, and it thereby appears on the record, that the Defendant after, and notwithstanding the claim of the goods made by the Plaintiff, sold them; if this is not such an Act as would make the Defendant a trespasser, ab initio, the Defendant can move in arrest of judgment; but the case is so clear that it is not necessary further to agitate the question.

It is clear that when a person having authority by Law, as contra-distinguished from an authority in fact, abuses that authority, this abuse of the authority, makes every thing done under it void. It is not, however, a mere negative abuse of the authority, that will have this effect. There must be some positive act, not a mere non-feasance; some direct invasion of property, to make the whole proceeding void, and the party a trespasser, ab initio. What then is the present case; the Law provides that if the nets seized are not claimed in a certain time they shall be forfeited and sold; in this case they were claimed within the time limited by law, and therefore no forfeiture was incurred; the Defendant nevertheless went on to sell and deliver the nets as if they were forfeited. This was a direct invasion of the property of the Plaintiff, and made the Defendant a Trespasser, ab initio, and all his proceedings void; the case of the Estray, reported in 1st T. R. 12, *Oxley vs. Watts*, is directly in point.

The seizure here was originally lawful, but became unlawful by reason of the subsequent sale, when not forfeited according to law, and the Defendant is therefore rightfully mulcted in all the damages arising from his proceedings.

BOTSFORD, J. concurred.

CARTER, J.—If there was anything in this objection, it appears on the record, and the Defendant might have demurred, or moved for a non-suit, or may move in arrest of judgment, but clearly there is no ground for an application for a new trial.

I agree with His Honor the Chief Justice that there is nothing in the point taken by the learned Counsel; the illegal sale was an act which made the party a trespasser, ab initio, and rendered him liable for all the damage the Plaintiff sustained in consequence of such sale. In Comyn's Digest, Tres. C. 2, are two cases of acts which make a man a trespasser, ab initio, which seem applicable to the present case. "If a purveyor who takes "my cattle for the King's honour—*sells them.*"

"If a man has authority given by statute, and does not pur-
"sue, or abuses his power; as if a man having authority by sta-
"tute, 2 W. and M. to sell a distress for rent if it be not reple-
"vied within five days after notice, he sells it without notice
"given."

In both these cases the original taking was legal, but the subsequent sale was illegal, and therefore the man was a trespasser, ab initio.

PARKER, J.—I agree with His Honor the Chief Justice and my brethren. This was an action of trespass to personal property. The Defendant, it was proved, took, carried away, and disposed of the Plaintiff's goods. The defence set up was such as could only be available on a special plea of justification. This justification was so pleaded, and an issue joined thereon, which being found for the Plaintiff, destroys this defence. The only other issue was the general issue, denying the fact of the taking, and which was necessarily found for the Plaintiff on the evidence. I think the verdict was clearly right on both the issues, and ought not to be disturbed.

Rule refused.

PINE AND ANOTHER, *vs.* McLACHLAN.

The Defendant demurred to the Plaintiff's Declaration.—Demurrer books were delivered to the Court, and the cause entered in the special paper for argument.

J. W. Chandler for Defendant, moved for leave to amend his Declaration on payment of the costs of the demurrer, 1 Arch. Prac. 479. The *Solicitor General* suggested that the Rule, as to amendments at the present stage, was not general, but applicable only to special demurrers.

Sed PER CURIAM.

This is a matter in the discretion of the Court, and we think the Plaintiff should have leave to amend on payment of costs.

BLACK AND OTHERS *vs.* KIRK.

R. L. Hazen obtained a Rule *nisi* in Michaelmas to enter a suggestion to deprive the Plaintiffs of costs, under the Act of Assembly, 50 Geo. 3, c. 17. The action was Assumpsit. The Declaration contained counts for use and occupation; for wharfage and slippage of vessels, and the common money counts.

At the trial before CARTER, J. at the St. John Circuit in June, the Plaintiffs obtained a verdict for £4. CARTER, J. now reported the cause as an action brought to try the right to a wharf and part of a slip in the City of St. John, and the wharfage appurtenant thereto. The Plaintiffs proved their title to the premises under the will of the late Hon. John Black; and also put in evidence a conveyance made by the said John Black to L. Donaldson, of adjoining premises, which the Defendant had occupied under Donaldson. It was proved that the Defendant's vessels while lying at Donaldson's wharf had extended over the Plaintiff's property, and that the Defendant had received the wharfage dues of other vessels similarly situated. Notice had been given to him of the Plaintiff's claims. The defence rested on the construction of a particular clause in the Deed of Black to Donaldson, which His Honor conceived to be clearly in favor of the Plaintiffs; and that as they had made out their title to the freehold of the property, so partially occupied as aforesaid, they were entitled to recover; and directed the Jury accordingly. That the amount of damages was not very material, the action being brought to try the right, and so specifically stated in the bill of particulars. His Honor considered that the freehold had been in question.

N. Parker shewed cause at this Term. The action was of an intricate nature, in which damages were not the object, but the settlement of an important right; it was tried by a special Jury, and certified as a proper cause for a special Jury; the amount of the demand, if insisted on, would have exceeded £25, and besides the title of the freehold was expressly in question. He cited *Drew vs. Fletcher*, 1 B. & C. 283, *Axon vs. Dallimore*, 3 D. and R. 51.

R. L. Hazen in support of the rule, urged that the Plaintiffs' case did not affect the freehold; the Defendant did not claim that; the question was more in the nature of a right of way claimed by Defendant over the Plaintiffs' property. An easement, 12 E. 162. The action was for money had and received in which the title to the freehold could not be tried; the Plaintiff called for and gave in evidence the Defendant's deed, but the Defendant made no question as to the freehold, and called no witnesses.

The difficulty or intricacy of the case formed no sufficient objection to its trial before the Inferior Tribunal, if by its amount it was confined to it by the Act of Assembly. *Keay vs. Rigg*, 1 B. and P. 11.

BOTSFORD, J. referred to *Double vs. Gibbs*, 1 Dowl. Pr. C. 583, and *Sandby vs. Miller*, 5 East. 194. *Holden vs. Newman*, 13 East. 160, was also referred to.

PER CURIAM.

The Act of Assembly, 50 G. 3, c. 17, excepts from the Jurisdiction of Justices of the Peace, actions wherein the freehold of lands may in any way come in question. The learned Judge has reported the material question to have been the construction of a deed under which the Plaintiffs' right to recover for the occupation of their land was disputed, and he considered the freehold in question; the case is therefore clearly within the exception of the Act.

PARKER, J. having been concerned in the cause when at the bar, gave no opinion.

Rule discharged with costs.

N. Parker for Plaintiff.

R. L. Hazen for Defendants.

DOE EX DEM DUNCAN *vs.* CHRISTOPHER.

This was an action of Ejectment, tried before PARKER, J. at the Gloucester Assizes in September. At the trial, a motion for non-suit was overruled, but leave was given to move in Banc upon the point reserved, and the case went to the Jury. After the Jury had retired, a Juror was taken suddenly ill, and it being considered by a Physician, who by direction of the Court had visited him in the Jury room, that his attack was of an alarming nature, and required immediate medical aid, the parties not being able to come to any agreement, His Honor discharged the Jury.

J. A. Street at this Term moved for a Rule *nisi*, for a non-suit on the point reserved at the trial.

Sed PER CURIAM.

The point cannot now be considered; there is no verdict to set aside; the cause has not in fact been tried, but stands as a Remanet.

Rule refused.

FLAHERTY *vs.* SAYRE.

This was an action of Trover tried before CARTER, J. at the Westmorland Assizes in September last.

The Plaintiff offered in evidence a Bill of Sale to him of the property in question, made by John Smyth and William Smyth.

The instrument was attested by two witnesses, one of whom was proved to be out of the Province, and evidence was given of his hand writing; the other witness was the wife of John Smyth before mentioned.

The Plaintiff proposed to give evidence of her hand writing, but it appearing that she was within the Province,

J. Stewart for Defendant, objected to the evidence as inadmissible, the witness ought to be produced.

A. Stewart contended, that the witness being the wife of a person immediately interested in the event of the suit, was incompetent, and could not be examined, if produced; and he submitted that the Deed was sufficiently proved by the evidence of the hand-writing of the other subscribing witness, that it was unnecessary to go further, as it appeared that Mrs. Smyth, at the time of her attestation was incompetent, the Deed was therefore the same as if the name did not appear on the face of it. He cited 5 T. R. 371, *Swire vs. Bell*, and Roscoe's Evidence, 68.

E. B. Chandler and *J. Stewart* submitted that the incompetency of the witness was occasioned by the interest of her husband, through whom the Plaintiff claimed title to the property, and they had it in their power, by releasing the husband, to make her competent—knowing her to be interested, the Plaintiffs had made her a witness, and could not now object to her competency. 3 Camp. 195, *Honeywood vs. Peacock*. The deed could not be read without the testimony of the attesting witness.

CARTER, J. was of opinion that the witness should be produced.

The Plaintiff not being able to produce the witness, and the Bill of Sale being the foundation of their action, they became non-suited.

The *Solicitor General* at this Term moved for a Rule Nisi to set aside the non-suit for the improper rejection of the testimony. No notice of the motion had been given to the Judge.

CHIPMAN, CHIEF JUSTICE.—The rule requiring notice of motion to be given to the Judge, appears not to have been fully understood, and therefore as Mr. Justice CARTER has his notes in Court we will hear this motion, but it is to be distinctly understood that the Rule requiring notice to the Judge of motions for New Trials is to apply to all cases, whether the points be reserved or not.

The *Solicitor General*, in addition to the arguments used at the Trial, urged, that if the wife had not been a witness then the proof necessary to establish the deed was completed, that she being incompetent at the time of the execution, the attesta-

tion by her was a nullity. It was unnecessary for the plaintiffs to bring or produce the witness, if in fact she would have been objectionable when produced. The learned Counsel took a distinction between this and the case if the wife had been the only witness, then there would have been no evidence to establish the Deed; at the trial moreover, evidence of the vendor's hand writing was offered. He cited the case mentioned at Nisi Prius, and also 1 Star. Ev. 103, 337. On a subsequent day the Court refused the rule.

CHIPMAN, CHIEF JUSTICE. The ground of the incompetency of a wife as a Witness, is the interest of her husband in the subject matter of the suit; but it did not appear in the present case that the husband had any interest in the suit. His Honor mentioned a case in 1st Strange, 504, cited in Bac. Abr. Tit. Ev. A., where in an action for goods sold, a wife was admitted to prove the goods delivered on the husband's credit, and observed that this case was much stronger; the husband in the case in Strange might have been subject to a legal demand in consequence of the wife's evidence; it did not appear that even this would be the effect in the present case. If this objection to the wife's competency should be sustained, a wife never could be a witness to prove the signature of her husband.

The *Solicitor General* and *A. Stewart* for Plaintiff.
J. Stewart and *E. B. Chandler* for Defendant.

MARTINDALE AND WIFE *vs.* MURPHY AND WIFE.

This was an Action on the case for defamatory words spoken by the Defendant's wife of the wife of the Plaintiff, tried before PARKER, J. at the last Northumberland Circuit, to which the General Issue was pleaded, and a verdict given for the Plaintiff on the third count, with £32 damages.

The declaration contained the usual averment of good character, and that the words were spoken with the intent to impute *unchastity*—the expressions charged were very gross, but the material words were, "*She is a d—d strumpet, and J. P's whore;*" there was no inuendo explanatory of the words.

J. A. Street for the Defendant, moved in arrest of Judgment, and contended that the words were not actionable in themselves, nor had the Plaintiffs put such a construction on them in their declaration as would make them actionable, and there was no allegation or proof of special damage. The Act of Assembly, 31 Geo. 3, c. 5, which had been referred to at the trial in support of the action, applied only to certain specific offences, viz.

Incest, Adultery, and Fornification, neither of which were necessarily comprehended under the term unchastity, as that term would equally apply to the adultery of the heart, which was in the Scripture considered as much a crime, as the commission of the act itself; unchastity might be imputed without any charge of the offences to which the act of Assembly refers, and the Declaration in order to sustain the action ought to have charged a specific imputation of adultery or fornication.

PER CURIAM.

Under the Act of Assembly, a charge of this nature is clearly objectionable in this Province, if the words are such as to impute the offences thereby made actionable in the temporal courts. The words in this Declaration, calling a married woman a strumpet and J. P's whore, admit of no ambiguity, or doubt. Unchastity is a general term, like theft, which may include various particulars. To call a man a sheep stealer, thereby meaning to impute theft, is an analogous case. There is nothing in the inducement (supposing it to be material,) which can be taken to contract or abridge the natural and commonly received import of the words spoken.

Rule refused.

W. Carman for Plaintiffs.
Street & Kerr for Defendants.

CLARKE *vs.* ROBINSON.

Assumpsit, tried before PARKER, J., at Northumberland, in September last. Verdict for Plaintiff.

J. A. Street for Defendant, moved on affidavits, for a Rule Nisi to set aside the Verdict. The affidavits stated that a release had been executed by the Plaintiff previous to the trial, and that he had not authorised the bringing of the action. The release was annexed to the affidavits, and contained a certificate that the Plaintiff had not authorised the bringing of the action; this was dated 19th August, 1835. It appeared that the Plaintiff formerly resided in this Province, but had left it some years ago, and was now living in the United States, separated from his wife, who had been left by him at Miramichi.

This action was instituted by her for wages due her from Defendant for services performed subsequent to her husband's departure. When the case was put at issue, the Defendant went to the residence of the Plaintiff at Calais, in the State of Maine, and procured a full release. The Defendant's affidavit further

stated that he was prevented by illness from getting to Miramichi in time for the trial, and that he did in fact arrive the evening of the day on which the case was tried.

It was urged that although the action was for the services of the wife, yet being in the name of the husband, who alone was entitled to the money if recovered, his release and acknowledgment were sufficient to induce the Court to interpose and prevent his having the benefit of a verdict which had been obtained in consequence of the return of the Defendant having been delayed by illness. An application had been made at Nisi Prius to put off the trial on an Affidavit of the Defendant's Attorney, which however was admitted to be insufficient.

The following authorities were cited—8 Taun. 206; Cov. and Hughes 144, 1442; 10 Mod. Rep. 202; 2 Chitty's Arch. Pr. 927; 2 Salk, 648; 3 Taun. 484; Pratt. Dig. 629.

PER CURIAM.

This is an application to the equitable Jurisdiction of the Court; to re-open a cause for the purpose of admitting an unconscionable defence.—The plaintiff had abandoned his wife, she was compelled to seek her own livelihood, and earned an amount by her industry, to recover which she instituted this action necessarily in the name of her husband; the defendant did not attempt to meet her claim on any just or meritorious ground, but went out of the Province in quest of the plaintiff in order to procure a release, which would cut up by the roots the demand against him; had he been in time, probably in Law, the release if pleaded, *Puis darien continuance*, would have been a bar to the action, but having failed in that, he is not entitled to the least favor; he has not shewn that any actual adjustment of accounts or fair settlement took place between him and the Plaintiff, upon which the discharge was founded; he has no right to appeal to the equitable jurisdiction of the Court.

Rule refused.

End & Wheeler for Plaintiff.
J. A. Street and *Kerr* for Defendant.

HOLMES *vs.* CLARKE.

This was an action of Trespass tried before PARKER, J. at the Carleton Assizes in September.

The declaration contained several counts for Trespass, *quare clausum fregit*, and others, *de bonis asportatis*.

An agreement was put in evidence by the plaintiff by which it appeared that the defendant had let to the plaintiff the premises in question for the years 1834 and 1835, and *covenanted* "*to furnish a team for the use of the farm*;" in a subsequent part of the instrument it was mentioned that "*defendant should have the mare to ride when not employed on the farm.*" The Defendant reserved a part of the house and farm to himself, and had a right of access over every part of it.

It appeared that the defendant was dissatisfied at the plaintiff's manner of working the farm, and had declared that if he did not funish more labour, he, the Defendant, would not allow him to remain on the place or use the team.

It was proved that there was a team of horses on the farm belonging to the defendant which the plaintiff had been in the habit of using in ploughing and other farming operations.

On the 7th of May the plaintiff and his son took the horses of this team from the barn, and were getting them ready to put to the plough, when the Defendant interfered with much violence, and took them from them, and returned them to the barn. The other trespasses complained of were abandoned, and the Plaintiff's case rested upon this alone.

The *Solicitor General* and *Berton* moved for a non-suit, on the ground that the horses in question were the property of the defendant, in his barn, and in his possession ; and that the fact proved did not amount to an act of trespass, but a breach of contract. The plaintiff had not such an exclusive possession of the horses as would support trespass.

PARKER, J. overruled the objection, but reserved the point for the consideration of the Court in *banc.* The learned Judge left it to the Jury to consider whether the team of horses in question was that which by the terms of the agreement was to be furnished by the defendant; stating it as his opinion, if that were the case, that the plaintiff had at the time such a possession as would enable him to maintain trespass even against the defendant himself for forcibly taking them away. His Honor confined the attention of the Jury in assessing the damages strictly to the Act of Trespass, and the injury immediately resulting to the plaintiff thereupon. A verdict was returned for the plaintiff with £4 damages, to set aside which, and enter a non-suit,

The *Solicitor General* now moved for a Rule Nisi ; he contended that the Act of the Defendant was only a refusal to allow the plaintiff to use his, (the defendant's) horses, or to furnish a team, and that if the plaintiff had thereby sustained damage, his remedy was by action on the agreement, and not for trespass.

(CHIPMAN, CHIEF JUSTICE.—If the plaintiff had been ploughing, could defendant have taken the horses from the plough.)

If the horses were engaged in ploughing, then the presumption would have been that the defendant had allowed them to be taken for the day; but as it was when the plaintiff was about to take them, the defendant stopped him. The property was in the defendant, and even if the plaintiff had a right to take the horses without reference to the defendant, his right was only that of a tenant in common, and would not sustain trespass—1 T. R. 658.

CHIPMAN, CHIEF JUSTICE.—Had no doubt upon the question. By the agreement the defendant let to plaintiff his farm for two years, and agreed to provide a horse team; the import of the expression was that the plaintiff should be put in possession of the team for the use of the farm. The subsequent part of the agreement explained any ambiguity as to the intention of the parties, and provided that the defendant should have the use of the Mare when not engaged at farming, for riding; the definite article implied a specific team provided. The question put to the Jury was, whether the horses were the team provided for the use of the farm. In point of fact they were not in the stable, but were in the plaintiff's hands for actual use on the farm, when the Defendant took them. I think a clear case of possession was proved, and that the verdict should not be disturbed.

BOTSFORD, J.—The agreement produced was a lease of a farm on shares, in a way very common in the country. The defendant reserved a part of it; all the rest was let to the plaintiff on certain conditions. The defendant had a qualified right to the mare to use her for riding, when not engaged on the farm.

The verdict establishes that the horses were furnished under the agreement, and it appears that they were in actual use—when they were taken they were in the possession of the plaintiff, and the defendant had no right to take them.

CARTER, J. concurred.

PARKER, J.—I thought at the trial, and so stated, that it would have been better if the action had been on the agreement, as thereby the material matters in dispute between the parties would have been settled, which were necessarily excluded from consideration in this action, and I took much pains to confine the attention of the Jury strictly to the particular act of trespass proved. There was direct evidence that a team of horses was on the farm, which the plaintiff had been in the habit of using in the farming operations, to the exclusive possession of which for that purpose I considered him entitled under the agreement at the time they were taken away by the Defendant.

The Jury have by their verdict established the point that the horses were in the plaintiff's possession under the agreement, and I think there is no ground to disturb it.

Rule refused.

Beardsley and *Wilmot* for Plaintiff.

The *Solicitor General*, *Berton*, and *Needham* for Defendant.

BRANSFIELD *vs.* BISHOP, WHITE, AND TWO OTHERS.

Trespass for Taking Cattle, tried before PARKER, J. at the Carleton Circuit in last September.

There was evidence that the Plaintiff's Oxen had been at different times employed in the work of the several defendants, and that one of the oxen while ploughing for White had been seriously injured, and afterwards died. But supposing these to have been acts of trespass, there was nothing to show a connection between the defendants, except a declaration made by White, that "*they* had killed the Ox, and ought to pay Bransfield for him."

At the close of the Plaintiff's case, the learned Judge required the Plaintiff's Counsel to elect against which of the Defendant's he would proceed.

Berton, for Plaintiff, elected to proceed against Bishop, and claimed also to be allowed to proceed against White, because his admission was sufficient to connect him with any other defendant. This not being objected to by *Robinson*, the defendants' Counsel, was allowed, and the other two defendants were thereupon acquitted.

On the part of the defendants, evidence, was given that the plaintiff's agent had the cattle, and had used them in the service of the defendants respectively, and some evidence of his authority from the plaintiff was also given.

His Honor directed the Jury that they might find against the two defendants jointly, or against either of them individually, if jointly, then only for the trespass proved against Bishop; and left it to them to consider if the cattle were in the possession of the plaintiff's agent, and if he had authority to use or permit them to be used, or if the defendants were ignorant of his want of authority, stating it as his opinion, that the defendant's act in using the cattle by permission of the plaintiff's agent, was not a trespass; if the oxen had been left in the agent's possession, and the defendants were ignorant of his want of authority so to employ them.

Berton for plaintiff, moved to set aside the verdict as being against evidence, and contended that the admission of White was conclusive against him, and without reference to the other defendants, entitled the plaintiff to a verdict against him.

Sed PER CURIAM.

White's admission might be sufficient to charge him with the value of the ox, but connected with the other evidence is not sufficient to make him a trespasser; it is consistent with his admission to suppose that he hired or obtained the oxen from the authorised agent of the plaintiff, and if so, and the ox were injured, the plaintiff's remedy would not be by action of trespass.

PARKER, J. intimated that he had submitted the cause to the Jury against both defendants, in the manner already stated, at the instance of the plaintiff's counsel, which was not objected to on the other side, but he thought it had been left much more broadly than even the plaintiff's case justified.

Rule refused.

Berton and *Needham* for the Plaintiff.

L. Robinson for the Defendants.

FERGUS *vs.* M'INTOSH.

Chandler moved on affidavit to have the expenses of issuing a Commission to examine Witnesses, and in taking the depositions allowed in the costs of the cause.

PER CURIAM.

Let the costs of the Commission and depositions be made costs in the cause; under the late Act of Assembly such expences are made part of the costs.

L. Robinson—Am Cur mentioned a case, *Barlow* vs. *The Saint John Marine Insurance Company*, in Easter, 1830, where on motion the Court ordered a review of the taxation, and the Master to allow £10 10*s.* costs of executing a Commission.

MICHAELMAS TERM, 6TH WM. 4TH, 1835.

GENERAL RULES.

I. It is Ordered, That there shall be Sittings of Nisi Prius for the County of York, after the respective Terms of this Court, on the following days in each and every year, that is to say:—

Sittings after Hilary Term, on the Third Tuesday in February.

Sittings after Trinity Term, on the Fourth Tuesday in June.

Sittings after Michaelmas Term, on the Fourth Tuesday in October.

The said respective Sittings to continue for so long a time, as in the opinion of the Judge holding the same, may be necessary for the dispatch of the business depending.

II. It is further Ordered, That the Sheriff of the County of York do summon and return Grand Jurors and Petit Jurors, to attend at the several Sittings in that County, now appointed or hereafter to be appointed, in like manner as has been heretofore accustomed with regard to the Terms of this Court: and that hereafter no Jurors be summoned to attend at the Terms, without special order.

III. It is further Ordered, That all general Rules of this Court, which relate to the entering of Causes, the filing of Nisi Prius Records, or other proceedings at Nisi Prius, shall apply to, and be in force at, the Nisi Prius Sittings in the County of York.

IV. It is further Ordered, That in all Actions in which the Issue is made up and the *Venire facias Juratores* is awarded, as of the last return day, that is to say, the second Saturday after the first Tuesday, in any Term, such Writ of *Venire facias Juratores* may be awarded, and made returnable forthwith.

V. It is further Ordered, That the matters contained in the Crown Paper and Special Paper respectively, shall come on to be argued on the second day in each Term, any former Rule to the contrary notwithstanding.

VI. It is further Ordered, That no motion for a new trial shall be made after the first Saturday in any Term.

VII. It is further Ordered, That in all cases, where application shall be made to a Judge in Vacation after judgment by default, to make inquiry or assessment, under the Act of Assembly 5 Wm. 4, c. 37, s. 9, there shall be produced to the Judge a certificate or memorandum, of the day on which interlocutory judgment was signed or judgment by default entered, signed by the Clerk of the Pleas or his deputy: and that no such inquiry or assessment shall be made, unless such certificate or memorandum be so produced.

VIII. It is further Ordered, That every mesne process, in any Action, shall contain the names of all the Defendants, if more than one, in the Action.

IX. It is further Ordered, That the names of any number of Witnesses may be put in one Writ of Subpœna.

X. It is further Ordered, That in all Actions of Ejectment, the notice to appear, may be for any return day specifically, but when the notice to appear is for the Term generally, the day of appearance shall be the first day of the Term.

XI. It is further Ordered, That in all Actions of Ejectment, there shall be fourteen days exclusive between the day of serving the declaration and the day of appearance, whether the person served with the declaration lives within the County where the Court sits or not, any former Rule to the contrary notwithstanding.

XII. It is further Ordered, That when a Rule to shew cause is obtained to set aside an Award or Warrant of Attorney, or a Judgment entered upon an Award or Warrant of Attorney, the several objections, intended to be insisted upon at the time of making such Rule absolute, shall be stated in the Rule to shew cause.

XIII. It is further Ordered, That any Attorney, who on his being admitted an Attorney, was a Graduate of any College, may be called to the Bar after the expiration of one year from the time of his admission as an Attorney.

XIV. It is further Ordered, That the above Rules shall take effect on the first day of January next.

WARD CHIPMAN,
W. BOTSFORD,
J. CARTER,
R. PARKER.

CHARLOTTE CIRCUIT.

AUGUST, 1835.

BEFORE BOTSFORD, J.

DEWEY *against* ATKINSON.

This was an action of Assumpsit; the Declaration only contained the common counts.

J. W. Chandler for the Plaintiff, offered in evidence under the account stated, a parol submission between the parties, and an award made thereon, and cited 1 Esp. 194, Roscoe's Digest 256, and 2 Phil. on Ev. 112.

N. Parker, for Defendant, objected; the Plaintiff should have declared on the award, which was the usual practice, and the only decision in the Plaintiff's favor was the dictum of Chief Justice Eyre, in the case in Esp. which was unsupported by any modern authority.

BOTSFORD, J. reserved the point, with liberty to the Defendant to move to enter a nonsuit.

The submission was in writing, and expressly referred to a certain account between the parties, to be settled and adjusted by the Arbitrators. It was insisted by *Parker*, that before the award made by the arbitrators could be read in evidence, the account referred to should be produced as part of the necessary evidence for the Plaintiff, and in fact part of the submission itself;—unless the account were produced, it could not be known whether the award was consistent with the submission. The Plaintiff moreover was precluded by his bill of particulars from recovering; it purported to be for a balance due on an account stated, and therefore the Defendant was completely

taken by surprise. The Plaintiff should have stated the award in his particulars.

BOTSFORD, J.—The question is—could the Defendant from these particulars know what he was to meet, if they had stated it as so much due on an account stated, as would appear by an award made that would have been different; but here they are too vague, and the party is not made sufficiently acquainted with what the Plaintiff is proceeding for. I shall therefore reject the evidence.

The Plaintiff obtained a verdict on some other charges.

J. W. Chandler for the Plaintiff.
N. Parker and *Hill* for the Defendant.

DOE ON THE SEVERAL DEMISES OF M'KAY and WIFE, AND FOSTER *vs.* HOFFS.

The lessors of the Plaintiff claimed title to two-third parts of the Lot No. 109, in the Penobscot Association Grant, granted to Moses Gerrish, under a deed regularly recorded, but which had not been acknowledged by the grantor; one of the witnesses had proved the execution before the Register previous to the registering of the deed in the mode pointed out by the Act of Assembly; on this deed being offered in evidence,

N. Parker, for the Defendant, objected to its admission, unless the execution was proved in the usual way, as a deed not registered;—he urged that the section of the Act which authorised the admission of a deed recorded without further proof only related to deeds the execution of which was acknowledged by the grantor himself, and that the subsequent Act enacted merely that the Register should record deeds proved as this deed was, but did not make the certificate of registry sufficient proof of such deeds.

BOTSFORD, J. was of opinion that the deed was admissible, but reserved the point.

The deed when put in, appeared to be erased in several important parts.

N. Parker then contended that this appearing on the face of the deed should be explained.

Alexander Stewart for the Lessors of the Plaintiff, insisted that the Act of Assembly inverted the Common Law principle, and dispensed with the necessity of calling the subscribing witness to a deed to explain erasures or alterations, consequently it must do away with the necessity of any proof as to erasures.

There was hardly a deed made in the early settlement of the Province without erasures; and if the objection should prevail, it would do away with all benefit under the Act of Assembly, which dispensed with the strict proof of deeds, as in almost all cases it would be necessary to produce the subscribing witnesses to explain erasures and alterations.

Botsford, J.—I think there is something in the objection, but I shall allow the deed to be read, reserving the point.

It was proved by a witness who had examined the deed with the Record, that no alteration had been made subsequent to its being registered.

The lessor of the Plaintiff rested his case on the proof of the land in question having been originally granted to one Moses Gerrish, who, it did not appear, had ever been in possession of the premises, and on a conveyance from Gerrish to the Lessors of the Plaintiff.

On the part of the Defendant, it appeared that a man named Jacob Young, had some time previous, and up to the year 1818, been in possession of the land, and cultivated and improved it; that in that year he had conveyed to the defendants, who had ever since remained in possession. It also appeared in evidence that Jacob Young, in a conversation had with one of the witnesses, eighteen years ago, told him that he had the lot in question from one Charles Dupnach; that Dupnach was to have a certain part from Gerrish—he believed one third for settling it; that he (Young,) was to have Dupnach's part; and that Young said when Gerrish called for his part he would let him have it; upon which facts, *N. Parker*, in addressing the Jury, took the four following objections to the Plaintiff's right to recover.

1st. That there was no right of entry in either of the lessors of the Plaintiff at the time of the demise laid in the declaration. Moses Gerrish having been disseised, and the premises conveyed by the disseisor Young to the Defendant.

2d. That even if ejectment could have been brought by Gerrish, there was no right of action in the lessors of the Plaintiff, because the deeds from Moses Gerrish to Foster, and from M'Kay and wife to Foster were executed while the premises were in the adverse possession of a third person, consequently no title could pass by either of those conveyances.

3d. That Moses Gerrish had lost his right of entry, not having entered within twenty years after his title accrued.

4th. That there had been an adverse possession of upwards of twenty years by the Defendant.

On the first point he urged, that Jacob Young having been in possession until 1818, and having then conveyed all his estate

to the Defendant, that Act was a disclaimer of title in any other person, and amounted to a disseisin, therefore the defendant, the alienee, came in by title. Jacob's Law Dict. tit. discontinuance; Adams on Ejectment, 1, 8, 10.

On the 2d point, he contended that deeds of conveyance made by a party who had a mere right of entry to land, and while another person was in the adverse possession of that land could not pass any thing to the Grantee. Undoubtedly he urged the operation of the Province Law allows property to pass without a formal Livery of seisin, but it cannot be extended to allow a party to convey who has not seisin; it cannot enable a party to convey what he has not got; the Act only dispenses with actual livery of seisin, which is in fact a delivery of possession; whenever therefore a person could not give livery of seisin at Common Law, he cannot convey under that Act. It will not be contended that a person might maintain trespass on the possession given him by virtue of the Act of Assembly, without ever having had any other possession. He also cited the following authorities—4 Dane's Abridgement, 15; 1 Johnson's Cases, 85; 1 Schoale and Lefroy, 65; 4 Cruise's Digest, 112.

On the 3d point, he cited Adams on Eject. 45. A person must enter within 20 years after his title accrues. In a recent important case brought by the Corporation of Saint John, this very objection was taken, and the Judge non-suited the Plaintiff.—(Judge Botsford.—If there is an adverse possession.) —But without that a Plaintiff would be barred, even if a person had but ten years adverse possession.

As to adverse possession he cited 1 Esp. 363, 229; 1 Lord Raymond, 741; 1 Cowper, 217.

Botsford, J.—Left the question to the Jury as to the adverse possession, and told them that if they should be of opinion that Young and Hoffs had possession of two third parts of the lot, and held the same for and under Gerrish, the objection made by the Counsel for the Defendant would not avail him. But if they thought that there had been an adverse possession of twenty years, (and he did not see how they could find otherwise,) their verdict must be for the defendant.

Verdict for Defendant.

J. W. Chandler and *A. Stewart* for the Plaintiff.
N. Parker and *Hatch* for the Defendant.

DOE ON THE DEMISE OF WILSON AGAINST MILLIKIN.

A Grant was offered in evidence without any seal attached, but a piece of an old seal was pinned to the Grant.

The *Solicitor General* for the Plaintiff, contended that the Grant was inadmissible, unless it was first proved that the piece of seal pinned to it was originally annexed to the Grant.

A witness was then called who proved that he had had the grant in his possession more than thirty years; that it then had a seal attached to it in the usual way, and he thought the piece pinned to it was a part of the same seal.

The Grant, on this evidence, was admitted. In the course of the cause an objection was taken by *A. Stewart*, for the Defendant—that the King cannot grant land which is in the peaceable possession of a subject, without office being previously found and the land thereby vested in the King. But

BOTSFORD, J.—was of opinion that the King in such a case was to be considered in possession, and that no office was necessary; the subject would only be considered as an intruder.

Verdict for the Defendant.

The *Solicitor General* and *A. J. Street* for the Plaintiff.

A. Stewart and *J. W. Chandler* for the Defendant.

WATERS *against* WILSON.

Assumpsit on a special agreement made between the Plaintiff and the Defendant, for the manufacturing and delivery of a quantity of Logs.

The Plaintiff proved a written contract made between the parties, and having established the quantity of logs made under the contract, and their delivery to the Defendant, there rested his case.

The Defendant then offered in evidence a contract nearly similar in its terms to the one produced, but which was under the hand and seal of the Plaintiff, there was no subscribing witness to the contract, but the Plaintiff's signature was proved.

J. W. Chandler for the Plaintiff objected to the contract being admitted on two grounds. 1st. That a sealing and delivery should have been proved; and 2dly. That this was an action brought by the Plaintiff on a parol Contract, signed by the Defendant, and the deed now offered was signed and sealed by the Plaintiff alone, and therefore there was no mutuality shown by that contract as between the Plaintiff and the Defendant. On the 1st point, he urged that the sealing of the deed must always

be proved, otherwise a party might put the seal on himself and thereby defeat the Plaintiff's remedy.—He cited 1 Saunders' Pleading and Evidence, 423. Deed.

The *Solicitor General* in reply, cited Roscoe's Ev. 70, 1 Phil. on Ev. 457; 7 Taunt. 251.

Botsford, J. expressed a doubt on the point; he seemed to think that the cases cited by the Solicitor General, (which decided that proving the handwriting of a party executing a deed to which there is no subscribing witness, was sufficient,) meant to imply that the witness must have seen the party sign the instrument. He however admitted the Contract, reserving the point.

The *Solicitor General* then moved for a Nonsuit. It appearing that there had been a contract under seal made by the Plaintiff for the delivery of the logs in question, he should have resorted to that as being the highest security, and could not maintain assumpsit. 1 Chitty on Pleading, 117.

2d. There appeared a variance between the Contract and the declaration, and there had not been sufficient proof of some of the averments.

J. W. Chandler insisted, that at all events the Plaintiff might resort to the Common Counts; but

Botsford, J. having intimated an opinion in favour of a nonsuit, suggested a reference, which was acceded to by the parties, and the cause was referred.

J. W. Chandler and *Jack* for the Plaintiff.

The *Solicitor General* and *A. L. Street*, for the Defendant.

TURNER *against* HANSONS.

Trespass quare clausum fregit.

A witness called on the part of the Plaintiff was objected to on the ground that he had executed a deed of bargain and sale of the locus in quo to the Plaintiff. But it appearing that there was no covenant for title in the deed,

Botsford, J. decided that the witness was competent, and that the objection could only go to his credibility.

Another of the Plaintiff's witnesses had stated in his examination in Chief that he owned one of a tier of lots butting on the Plaintiff's land, which were known by the name of the Penobscot Lots.

On his cross-examination, *A. Stewart*, for the Defendants, asked the witness what quantity of land his lot ought to contain.

The *Solicitor General*, for the Plaintiff, submitted that the question could not be put in that way, the witness could not be

asked as to the contents of the Grant, unless the Grant itself were produced; the witness might be asked what land he held, but not what the grant gave him.

A. Stewart insisted that on a cross-examination he had a right to put the question; the witness having been examined as to his owning one of the Penobscot lots.

Botsford, J.—I cannot allow the question to be put in the way proposed; the witness may be asked what he calls his own lot, but not what was granted to him. Before you can do that you must produce the grant.

There was a verdict for the Defendants.

The *Solicitor General* and *A. L. Street* for the Plaintiff.

A. Stewart and *J. W. Chandler* for the Defendants.

TURNER *against* HANSONS.

This was another action of Trespass, quare clausum fregit, between the same parties, but on different land.

On the part of the Plaintiff a deed upwards of thirty years old, and recorded, was offered in evidence; but the acknowledgment before the Magistrate was merely in these words, "*acknowledged before me.*"

A. Stewart, for the Defendants, urged that the acknowledgment was not sufficient, and therefore the deed should be proved as if it had not been recorded. But,

Botsford, J. admitted the deed, and said that the deed being so old, he would presume that the acknowledgment had been made according to Law.

A witness was then called, who, on his examination, it appeared, was entitled, as tenant by the courtesy, to an eighth share of the lot on which the trespass had been committed; he had never conveyed his right to the Plaintiff, but his children had.

He was then objected to by the Defendant's Counsel, as being an interested witness.

The *Solicitor General* for the Plaintiff submitted, that it could be no objection to the competency of the witness, that this was merely an action for an injury done to the possession of the Plaintiff, and did not decide the title to the land, consequently the verdict in that cause could not affect the witness. He cited the case of a landlord, who might be called to prove his tenant in possession; also the case of an underwriter who was called as a witness for another underwriter on the same policy.

Botsford, J.—I think the case of a landlord is different; here there has been an adverse possession; the witness may

wait to see the result of this action, and if the Plaintiff recovers he may then proceed for his share; he is therefore, I conceive, interested in the result. Under the circumstances, however, and there being no plea of liberum tenementum on record, I shall admit the witness, and let the objection go to his credibility.

One of the acts of Trespass laid in the Declaration, was for erecting a house on the Plaintiff's land, and one of the Plaintiff's witnesses having stated that he saw two of the Defendants at work at the house on a certain day, but that the third was not present.

A. Stewart for the Defendants, insisted that the Plaintiff having given evidence of a trespass by two, he was then bound, and having made his election, that he could not now go into evidence of a trespass committed by three.

The *Solicitor General* contended that the Defendant's Counsel was premature in the objection he had taken, as he should have waited till the evidence for the Plaintiff had been gone through with; and then if all the Defendants had not been proved to have been concerned in that act of trespass, he must of course make his election; but he had a right to show that all three were originally concerned in building the house.

Botsford, J.—No doubt where a person proves first a joint act of trespass, he cannot afterwards go into evidence of a trespass committed by other parties; but this is an action of trespass for building a house, not two or three houses; the building the house is therefore a continued act of trespass, though committed at different times.—In the Gully case which has been mentioned by the Counsel for the Plaintiff, the action was brought for building a dam, and the Plaintiff having proved that at one time all the Defendants were present at the dam, he was afterwards allowed to shew that at other times some of the defendants were working on it. This case is therefore precisely similar in principle to that.

The lot in question formerly belonged to a man named Benjamin Millikin, who left eight children, from most of whom the Plaintiff had purchased. Norman Milliken, the eldest son soon after the death of his father, being indebted to one of the present Defendants, gave him a deed of a particular part of the lot, containing about twenty-one acres, which part, that defendant, by the consent of the other heirs, had taken possession of under the deed, and had continued to hold ever since; but there had never been any partition of the land among the heirs. On this evidence,

The Defendants' Counsel moved for a non-suit, on the ground that by the Plaintiff's own showing, he and the Defendants were tenants in common, and consequently trespass was

not maintainable. He urged that the assent of the heirs to the conveyance made by Norman Millikin could not affect the question, as they were at that time under age; they had all, therefore, as much right to that part of the lot as to any other; all the Deeds they had given to the Plaintiff tended to shew that, for in all of them they had released their right and title to the whole lot, describing it by metes and bounds, and comprising as well the parts sold by Norman Millikin as the other part.

The *Solicitor General*, contra, admitted that if the Plaintiff in this case were seeking to recover damages for trespass committed on that part of the lot sold to the defendant, then the arguments advanced by the Plaintiff's Counsel would apply, as perhaps as to that part the parties were tenants in common; but even supposing them to have been tenants in common of the whole, still he contended that where there has been an agreement between tenants in common, that each shall hold a particular part of the common estate, and one afterwards disturbs the others in their possession, trespass will lie against him; and in support of this he cited 4 Kent's Commentaries, 370. At all events, the argument could only apply to the defendant.

BOTSFORD, J.—The general principle, it is true, is, that one tenant in common cannot bring trespass against his co-tenant, but there are cases where that principle will not apply. If one tenant in common occupy a part of the land for twenty years and upwards to the exclusion of the others, and receive all the rents, that would be considered an ouster of his co-tenants. In this case it appears that Norman Millikin sold a particular portion of this lot to one of the Defendants five and thirty years ago, and that he has occupied that part ever since, without any claim or interruption by the heirs. I think therefore the Jury would be justified in presuming an ouster of the heirs as to that part. For these reasons I shall let the cause go to the Jury.

The *Solicitor General* and *A. L. Street*, for the Plaintiff.

A. Stewart and *J. W. Chandler*, for the Defendants.

WESTMORLAND CIRCUIT.

SEPTEMBER, 1835.

BEFORE CARTER, J.

WILLIAM SMYTH *versus* GEORGE ROGERS.

In this cause, *Chandler* for Defendant, moved to put off the trial on affidavit, shewing that Joseph Rogers, a material witness for Defendant, had left the Province for England in July last, before notice of trial given, and had not since returned.

On behalf of the Plaintiff, affidavits were produced, by which it appeared that the Plaintiff was under a peremptory undertaking to try the cause at the present Circuit; that the witness, (who was Defendant's brother,) had returned to this Province, from a voyage to England, in the early part of the past summer, and his intention to proceed to England on another voyage, was notorious and well known to the Defendant long before the witness left the Province. Upon which it was contended that as the Defendant had put the Plaintiff in a situation which obliged him to be ready, the Defendant ought also to have been prepared for trial; that being aware of the witness's intention of leaving the Province, the Defendant could, and under the circumstances ought to have had his testimony taken before a Judge, as authorised by an Act of the Province, (5 Wm. 4, cap. 34,) and availed himself of it at the trial; not having done so, he was in default; that the application was to the discretion of the Court, and as the Defendant had neglected to procure the evidence, when in his power, he was not now in a situation to ask the Court to exercise its discretion in his favor. In reply, *Chandler* mentioned the case of Fergus *vs.* M'Intosh, in which,

under similar circumstances, the present Chief Justice, had last year postponed the trial. He also cited 2 Arch. Prac. 287.

CARTER, J. said he at first had doubts whether the Defendant ought not to have had the testimony of the witness taken before a Judge, as authorized by the Provincial Statute, but on further consideration, he thought that in this case the Defendant was not bound to do so. The case therefore came within the general rule mentioned in Archbold, and Defendant was entitled to have the trial put off on the usual terms.

J. Stewart for Plaintiff.

E. B. Chandler for Defendant.

M. HASHI *vs.* PETER LYONS AND CHAS. LYONS.

This was an action of Trespass for entering upon Plaintiff's land in Shediac, called Lot No. 3, and cutting and taking away saw logs and ton timber therefrom. The close was only described in the first count, and the declaration contained a count de bonis asportatis.

The Defendants severed in their pleas. Peter Lyons pleaded the General Issue to the whole declaration, and several special pleas upon which issues were taken. Charles Lyons, Not Guilty, upon which issue was joined. Liberum tenementum to the 1st and 2d Counts, on which issue was taken; and to the 2d, 3d, and 4th Counts, "that our Sovereign Lord the King was seized and possessed of the several closes and lands in those counts mentioned in his demesne as of fee in right of his Crown; that license and permission was duly given to the Defendant to enter upon the same, and from the trees and wood thereon growing and being to cut down and take away for his own use a certain quantity of Saw Logs and Ton Timber;" and Defendant justified the entering, cutting, and taking away the Saw Logs, &c. under such license: averring the same to be the trespasses complained of by the Plaintiff in those counts. The Plaintiff replied that the closes mentioned in 2d, 3d, and 4th Counts, were not seized and possessed by our Sovereign Lord the King, in his demesne as of fee in right of his Crown; upon which issue was joined.

On the part of the Plaintiff, a Grant from the Crown of several Lots of Land, numbered from 2 to 14, to several French Inhabitants of Shediac was given in evidence; among which the Plaintiff was the Grantee of Lot No. 3. It appeared that the front and base lines of the whole tier of lots had been run out, but not the side lines until after the present action was brought.

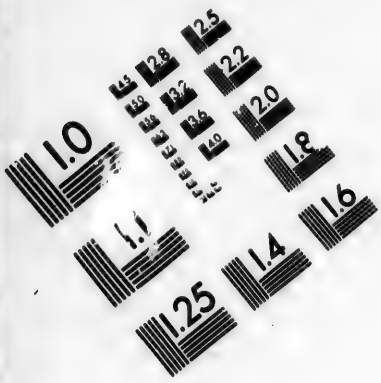
In the winter of 1833–4, Charles Lyons, who worked the one half of a Saw Mill at Shediac obtained a license to cut a quantity of Saw Logs upon Crown Lands in Shediac, and it appeared as well by the Plaintiff's Grant as the Witnesses, that part of the Crown lands adjoined the rear line of the French lots. It was proved by the owner of Lot No. 2, that on one occasion, he, in company with another of Plaintiff's witnesses, met Defendant's team loaded with logs driven by M. O'Brien, [his teamster] and another person with him upon Lot No. 2, near to No. 3, and the witness forbid them taking away the Logs; they however carried the logs away to Defendant's mill pond; the witnesses followed the team track on to No. 3, where they observed the marks of recent cutting, but it also appeared that the road they met the team on, passed over the Lots Nos. 2 and 3, and on to Lot No. 4, on all of which trees had been cut down, and it did not appear from which Lot the logs upon the team had been cut or taken. It also appeared that one Taylor had his hired men about the same period, cutting on and hauling from some of these lots. The Plaintiff then gave evidence of the number of stumps remaining on Lot No. 3, in November following, after this suit was commenced; some of which the witness had observed in the preceding May, when running out the Plaintiff's side lines. The principal witness in the cause was W. Layton, a Deputy Commissioner of Crown Lands, from whose testimony it appeared, that in the Spring of 1834, he was at the mill worked by Taylor and Charles Lyons, to ascertain the quantity cut by the latter on Crown Lands, and whether he had exceeded his license: and on that occasion a quantity of logs and deals were pointed out to him as being cut on private property. Charles Lyons called his teamster, O'Brien, and one Porrier, to satisfy witness that the logs were not cut upon Crown Lands, and upon the examination which then took place, the witness understood from O'Brien and Porrier, that the logs he was enquiring about had been cut on the French lots, Nos. 3 and 4. Some of the owners of the French lots were present at the time, (the Plaintiff was not one of them,) and there was much angry dispute between them and Charles Lyons respecting the logs. At the instance of the witness, who urged a settlement, Lyons offered to pay them for all that his men might have cut on their lands, the same price as he paid to the Crown, which they refused to receive. The evidence by which Plaintiff attempted to connect Peter Lyons, was that he was the owner of the one half the Saw Mill; that he had been frequently seen carrying loads of hay and provisions towards the mill, that Charles Lyons was his son, and he had said he intended to give him the property, and that after this suit was brought, he had

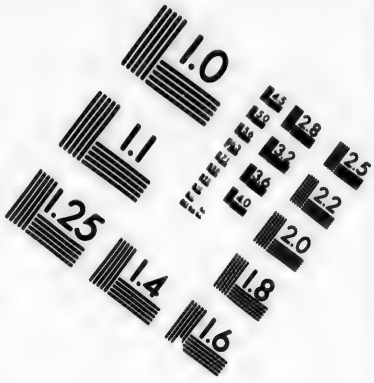
endeavoured to effect a settlement with Plaintiff. It was proved that his place of residence was at Sussex Vale, more than sixty miles from Shediac, and he had never been seen working at, or interfering with the management of the mill, nor selling the lumber, nor receiving any benefit from the produce thereof.

Upon the close of the Plaintiff's case, *A. Stewart* moved that Peter Lyons, against whom there appeared no evidence, should be acquitted, which after argument was directed by the learned Judge.

For the Defendant, Charles Lyons, it was proved, that under his license to cut upon Crown Lands, he sent his men into the woods, strictly charging them to be careful in cutting; to keep upon the King's lands, and not to trespass upon private property, particularly not to go upon the French lots, which adjoined to the Crown Lands. It also appeared that the Defendant did not go into the woods himself, and was not aware but that his men had been cutting on the King's land, until afterwards informed by the Plaintiff and other owners of the French lands; that he then offered to pay the Crown rate for all the logs his men might ignorantly have taken from their property. That Taylor's men and teams were in the woods about the same place, near a month before his men went there, cutting and hauling ton timber and logs; that it was impossible to tell upon whose lands his men had been cutting, or how much; and Defendant had always before supposed they had been cutting on Crown Lands under his license.

Upon this evidence, *Stewart* moved for a nonsuit; the testimony on the part of the Defendant explaining and being consistent with the evidence given on the part of the Plaintiff, shewed that the Defendant was not a trespasser, and not liable in this form of action. He was not present at the time any trespass was committed on the Plaintiff's property, if any ever were committed by his servants; he did not command, but on the contrary expressly directed them not to trespass on the French lots; and there is no evidence of subsequent assent on his part. The offer to pay the Crown rate to *all* the owners of French lots then present for whatever his servants *might* have cut on their lots was not proof of an assent to the previous unauthorised trespass. The French people were claiming damages from him; there was angry recrimination between them; the Defendant did not admit there had been any trespasses, but at the instance of the witness, and for the sake of peace, he offered to pay the Crown price for any logs his servants *might* have cut on private property. The only testimony which in any way shewed a trespass by Defendant's servants, was that of Layton, and although the Defendant would be bound by what O'Brien, his





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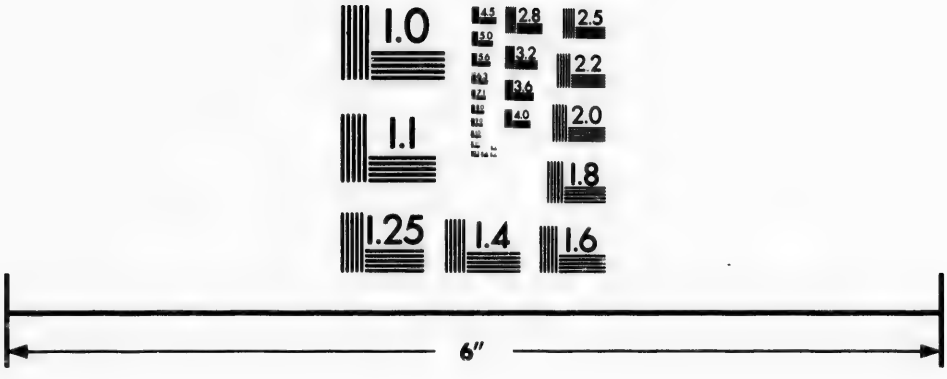

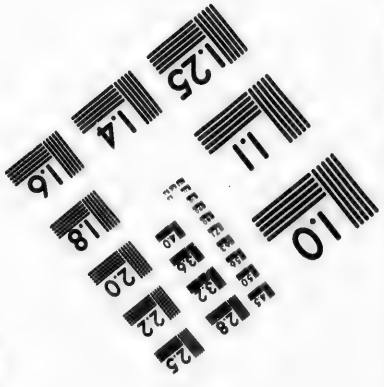

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servant, said, when produced by him, as a witness; yet Layton did not state what O'Brien *said*—he gave the result of his investigation upon examination of O'Brien and Porrier, the latter being produced by Taylor; but, at all events, it only shewed that at that time the Defendant was aware that logs had been cut *against* his authority upon the lots, Nos. 3 and 4. Being *aware* of the trespass was no proof of an assent on his part, and his offer on the same day and at the same time to pay the Crown price, would not put him in a worse situation.

CARTER, J. noted the objection, but refused to nonsuit, as in his opinion there was some evidence of a subsequent assent; the trespass being for Defendant's benefit. In summing up to the Jury, he said there were three questions for their consideration. 1st. Whether O'Brien, the Defendant's servant, cut any timber on the Plaintiff's lot, No. 3.—2d. Whether in cutting the logs, he was acting as Defendant's servant, and by his express direction.—3d. Whether O'Brien cut the timber without the direction of the Defendant, and that afterwards the Defendant knowing of the trespass, availed himself of it. After recapitulating the testimony he stated—

If Charles Lyons, knowing the logs to have been cut on Plaintiff's land, afterwards used them, and availed himself of the benefit of the trespass, he will be liable, but if otherwise, he will not; therefore, if on the whole case you think there was no trespass committed by O'Brien on Lot, No. 3, your verdict will be for the Defendant; if otherwise you find there was a trespass, and that it was committed by direction of the Defendant, or that it was without his direction, but that he afterwards knowing of the trespass availed himself of the benefit, the Plaintiff will be entitled to your verdict.

Verdict for Plaintiff—damages, £7 : 10s.

After the verdict, *Chandler* applied for a Certificate under 8 and 9 William III, c. 11, that there was reasonable cause for making Peter Lyons a Defendant, in order to deprive him of his costs; and he cited Hullock, 140, 2 Arch, 284, and 3 Camp. 85, to show that this was a case in which such certificate ought to be granted. *Stewart* opposed the application, contending that the reason which induced the Court to direct an acquittal, there being *no* evidence was sufficient to shew there was no reasonable cause to make him a Defendant; that the case in Campbell was an authority against the Certificate being granted; *there* Lord Ellenborough held that Solomons was in point of law a *trespasser*—here the learned Judge had directed an acquittal of Peter Lyons, because there was *no* evidence to make him a trespasser.

CARTER, J. after referring to the statute and Hullock 140, granted the Certificate.

E. B. Chandler and *J. W. Weldon* for Plaintiff.
Alexander Stewart and *J. Stewart* for Defendant.

A motion was afterwards made in Michaelmas Term, by *Berton* for Defendant, for a Rule Nisi, to set aside the verdict upon the same grounds taken at the trial on motion for nonsuit.

The Court refused the Rule.

PECK *vs.* ROGERS AND OTHERS.

This was an action of Trespass, qu. cl. fre. to which the General Issue was pleaded.

The Plaintiff proved that Defendants in December last, after being forbidden, came upon his land, claiming a right of way in the winter season, from certain mills belonging to two of the Defendants, over the Plaintiff's marsh to the high way, and against the Plaintiff's will, passed and repassed with empty and loaded teams. It was also proved that some trees which the Plaintiff had placed in the road to obstruct the Defendant's passage, had been cut out, the Plaintiff's fence thrown down, and some of the poles broken by the Defendants; but the damage proved was trifling; the land having been at the time of the trespass hard frozen, and covered with ice and snow.

The Defendants, in mitigation of damages, gave evidence, to shew that it was customary in the winter season, in this Province, to put down fences, and pass over any person's land wherever convenient for passage; that a winter road over the Plaintiff's marsh had been used for many years, and the summer road from the mills being impassable in the winter, the way over the Plaintiff's land became one of necessity;—that Defendant's had offered to pay whatever damage had been done, and it was contended that no actual damage had been sustained.

Verdict for the Plaintiff—damages, £3.

E. B. Chandler and *J. Stewart* for Plaintiff.
A. Stewart and *Dickey* for Defendants.

SAYRE *vs.* JAS. KELLY, EDGET, & JOHN KELLY.

This was an action of Trover for a quantity of Boards levied on by the Plaintiff under an Execution against James M. Kelly, at the suit of Levi Lockhart.

The Declaration contained but one count, which alleged that Plaintiff, *as Sheriff of Westmorland*, on the 1st September, 1832, was lawfully *possessed* of the goods in question; that Defendants knowing the same to be the property of the Plaintiff, *as such Sheriff as aforesaid*, converted the same, and it concluded to the damage of the Plaintiff as such Sheriff as aforesaid. The Defendants had shipped the boards for which the action was brought, and carried them from Petticodiac to Saint John.

In support of the Plaintiff's case, an exemplification of the Judgment, Lockhart *vs.* Kelly, was given in evidence, and an exemplification of the Writ of Fi Fa, issued on the Judgment was also offered. On examining the latter, it appeared that besides the execution, the indorsements made thereon by the Plaintiff of its receipt by him, and his return thereto, (viz. "received 22d May, 1832," "levied on boards, 30th May, 1832,") were copied in the exemplification.

A. Stewart for Defendants, objected to the reading of the indorsements, alleging that if the Writ itself were produced, the Plaintiff's endorsements could not be read as evidence for him, although as *against* him, and between other parties, they would be evidence; and he contended that the Seal of the Court being affixed to such copy, could not make that evidence, which would not have been evidence, if the original had been produced. He urged that the Court had no power to exemplify affidavits, vouchers, pleadings, or any documents on the files of the Court, not being records thereof; the power of exemplifying being confined to its own records, one of which the Writ was when affiled; but the Plaintiff's endorsement formed no part of such record. As proof of the Writ, the exemplification was admissible, but he submitted the Plaintiff's endorsements could not be read as evidence of the facts stated. He cited Stark Ev. 1335, 1357.

J. W. Weldon, in reply, offered the exemplification as evidence of all it contained, as well of the writ as of the Plaintiff's endorsements. That the Sheriff was a public officer, and his official acts were entitled to credit; he was required by a statute of the Province to endorse on every Writ the time of its receipt by him, and in a late case, (*Johnston vs. Winslow*, *ante* 37,) it was decided that such endorsement formed part of the record, the exemplification of which was conclusive evidence of the fact stated in such indorsement, and could not be impeached. That the endorsement of the return being a necessary official act of the Sheriff in the performance of a public duty, was of equal validity, and became part of the same record when the Writ was affiled which the Court had authority to exemplify. He there-

fore submitted that the exemplification was admissible to prove every thing contained in it.

CARTER, J. admitted the evidence, reserving the point.

It appeared also that the Plaintiff about the latter end of May, or early in June, went to the house of John Jones, near which the boards in question were piled, and requested Jones to take carge of them for him, stating he had been making a levy on them; Jones refused, telling the Plaintiff he already had them in his charge for Mr. M'Cardy, a Deputy Commissioner of Crown Lands, who had previously seized the same, as being made from Logs cut on Crown Lands without license. The witness stated he was with M'Cardy at the time of the seizure, and that he marked the boards with the broad arrow, and placed them under his charge.—It also appeared that in July following, the Plaintiff went to the place where the boards were piled, and offered to sell them to Aaron Jones. The Deputy Sheriff stated he had the Writ of Execution, (Lockhart *vs.* Kelly,) in his possession, when he passed the boards the latter end of May or first of June, but he did not then levy, because he had not time to secure the property. The boards were piled near the highway, and were claimed by John Kelly as his property; it was admitted he was under age at the time, being no more than nineteen: all the Defendants were aiding and assisting in the shipment of the lumber in the latter part of July, 1832. The witnesses stated they knew the Plaintiff as the Sheriff of the County. On close of Plaintiff's case, a nonsuit was moved for on the following grounds:

1st. That the special character of the Plaintiff alleged in the Declaration was not sufficiently proved. Roscoe, 313; 4 B. and C. 566; 8 T. R. 303.

2d. That the property in the lumber at the time of Plaintiff's levy was vested in the Crown; or whatever property James M. Kelly might have had was divested by the seizure of the Deputy Commissioner of Crown Lands. Selwyn, 1294; 1 Camp. 435; Stark Ev. 1493; 3 Stark, 130.

3d. No possession in the Plaintiff at the time of the taking by the Defendants;—actual possession or custody of personal property, seized under execution, being necessary on part of the Sheriff, who has only a special property for the purpose of sale. 3 Stark Ev. 1488; Selwyn, 1332–34; and Impey, 109, 287, and 289, were cited.

A. Stewart submitted, that as the Plaintiff had chosen to allege in the declaration, his special character of Sheriff, and to found his title to the property in virtue of such character; it was incumbent on him to prove it according to his allegation; the witnesses stating that the Plaintiff was *called* the Sheriff,

and that he had acted as such was not sufficient. His patent of appointment, the best evidence the nature of the case required, was within the Plaintiff's power, and ought to have been produced;—the General Issue put every allegation in issue, and the Plaintiff must recover secundum allegata et probata. The second objection, he contended, was fatal to the action. Whatever property James M. Kelly might have had in the lumber, ceased before Plaintiff's levy; there was no property in Kelly for the Writ to operate upon; it was vested in the Crown, or at all events divested out of Kelly. As to the last objection, he submitted that actual possession was essential to enable the Plaintiff to maintain the action. The Sheriff could not have a constructive possession of personal chattels in Execution; he had only a Special property in a debtor's goods upon seizure for purpose of sale, until which it was necessary the goods should remain in his custody. In England it was the ordinary course when a seizure was made, to put an officer in charge until the goods were sold, and leaving the possession was an abandonment of the goods.

Weldon, in reply, (being desired by CARTER, J. to confine himself to the second point,) urged, that although at the time of the levy, the boards were under seizure of the King's Officer; from the circumstance of the subsequent shipment by the Kellys, it might fairly be inferred, that the property had been released from the seizure made by the Deputy Commissioner of Crown Lands, upon which the previous levy made by the Plaintiff would attach, and give him a special property under the Execution sufficient to maintain the action; and he submitted that it was a question for the Jury to determine under the circumstances given in evidence. He cited Impey, 289; Dalt. 19.

CARTER, J. was of opinion there was no property in James M. Kelly at the time of Plaintiff's levy upon the boards:—they were then under seizure, and in custody of the officer of the Crown, and Kelly's right, whatever it might have been, divested out of him; on the first point he said he certainly should not have nonsuited, but the second could not be got over.

Nonsuit.

J. W. Weldon and *Sayre*, for the Plaintiff.

Alexander Stewart and *J. Stewart* for Defendant.

DODGE *versus* READ.

Assumpsit on promises to marry.

The Declaration contained five counts, in one of which was stated as a breach, that Defendant had married Abigail Wallace.

The defence set up was, that after the promises, the Plaintiff had voluntarily relinquished the contract, and given her consent that Defendant should marry his present wife. To prove this defence, a number of witnesses, (principally relatives of the Defendant,) testified to conversations with the Plaintiff at different times *after* the Defendant had ceased paying attention to the Plaintiff, and was engaged to marry Miss Wallace. In these conversations the Plaintiff had said, she was glad the Defendant had left her; that she did not wish him to return, and would not have him if he should; that she was willing he should marry Miss Wallace, and he had her free consent to do so—with expressions of a similar nature; but all the Defendant's witnesses, (with one exception,) stated their belief that the Plaintiff, at the time she made use of those expressions, was much attached to the Defendant, and would willingly have married him at any time previous to his marriage. It also appeared that most of the expressions given in evidence were drawn from the Plaintiff by the witnesses introducing the subject in conversation, and endeavoring to be jocose, or affecting to condole with her on the Defendant's desertion, and on some of the occasions it was stated she was in tears.

CARTER, J. in leaving the cause to the Jury, said—"The defence attempted to be set up is that the contract was rescinded, and that Plaintiff gave her consent to Defendant's marriage; if the Plaintiff seriously and deliberately agreed with Defendant to abandon the contract, and consented that he should marry Miss Wallace, then in point of Law I consider the defence an answer to the action; but if you are not satisfied that she did so, coolly and deliberately; then I think the defence has failed. If therefore from the expressions given in evidence you are satisfied the Plaintiff seriously intended to release the Defendant, and in a sober mind deliberately gave her consent that he should marry his present wife, you will find for the Defendant; but on the contrary, if you are not so satisfied, if you believe her expressions were merely the result of wounded pride or irritated feeling, I have no hesitation in telling you the defence has not been made out, and the Plaintiff is entitled to your verdict.

Verdict for Plaintiff—damages £75.

Alexander Stewart and *J. Stewart* for Plaintiff.
E. B. Chandler and *J. W. Weldon* for Defendants.

JOSEPH ROGERS *versus* LAURENCE O'REGAN.

Trespass for seizing, taking, and carrying away Plaintiff's Logs;—the Declaration also contained Counts for burning, cutting up, and destroying the same. Plea—General Issue.

In the spring of 1832, one Dogherty had sold the Plaintiff, for six pounds, a lot of logs then lying on Defendant's land, previously cut thereon by Dogherty, and the Defendant at the time agreed to allow the Plaintiff until the following Spring to remove them. It also appeared that in December, 1832, one Bishop, who was authorised by Defendant to haul away these logs, (as well as others subsequently cut down,) had piled about forty of them ready for sledding, and for that purpose cut a few of the long logs into deal lengths; but he did nothing further, and none of the logs were removed from the land, or afterwards disturbed.

The defence was, that the sale was conditional; that it was part of the Plaintiff's contract to remove the logs from Defendant's land before the Spring of 1832, or forfeit his right to the property, and in such case the Defendant was to be at liberty to burn or do what he pleased with them. The Contract was proved as stated, and it further appeared that in a conversation between Plaintiff and Defendant respecting the logs, in November, 1832, the Defendant remarked, that as he (the Plaintiff,) had not removed them in the Spring, he had forfeited his right to the property; to which Plaintiff observed, he thought he had until the last day of November to take them away; whereupon the Defendant said, "If you had, go and take them; your time is short." The piling and cutting complained of took place in the December following, a short time previous to the commencement of this action.

Carter, J. in summing up, told the Jury that there were two questions in this case. *First*, whether a trespass was committed; and *second*, whether the Trespass was committed upon the property of the Plaintiff. That whether the property in the logs was the Plaintiff's, would depend altogether on the terms of the original bargain with Dogherty.—If by the original contract the logs were to be removed by a certain time, and on failure to become the property of the Defendant, and the time limited, was before the trespass complained of, then the action could not be maintained, as the Plaintiff's property in the logs had ceased, but if the time had not expired then a trespass had been committed on Plaintiff's property, and the action might be sustained. He observed: the only question for the consideration of the Jury was—Whether at the making of the contract between Dogherty and Plaintiff, there was a time limited

for the Plaintiff to take away the logs, and that time was before December, 1832.

The Jury found for Defendant.

E. B. Chandler and *J. W. Weldon* for Plaintiff.

Alexander Stewart and *J. Stewart* for Defendant.

JAMES AYER *versus* DAVID PURRINTON.

This was an action of Covenant upon a Deed or Agreement for tanning and currying Leather by the Defendant for the Plaintiff.

With the exception of a Clause limiting the number of hides and skins to be tanned by Defendant, the whole of the Deed was set out in the Declaration, and five breaches thereon assigned.—The Defendant after Oyer, pleaded, Non est factum; several pleas of fraud, and pleas to the different breaches, upon which issues were joined.

Upon the deed being read in evidence, *A. Stewart* submitted, that the Plaintiff could proceed no further, and moved for a nonsuit on several grounds of variance.

1st. A variance between the deed given in evidence, and the Nisi Prius Record. In the latter, the Defendant's undertaking was stated to be to curry the tanned hides as "*fast as* Plaintiff might want them." This materially varied from the deed, and gave a different meaning to the contract. The deed stated that Defendant was to curry the hides "*as*" (i. e. *into such sort of leather as*) Plaintiff might require; but in the record, the addition of the words, "fast as," did not refer to the quality or kind of leather, but bound the Defendant to perform the service as soon as Plaintiff required.

2d. A material variance between the *Declaration delivered* and the evidence. In the deed, the Defendant in lieu of certain services, covenanted to be performed for the Plaintiff, agreed to take the work of one Barnes at the expiration of *five* months; the declaration stated *four* months;—the time in this particular was material, and the variance fatal on non est factum. In the Nisi Prius Record the time was correctly stated, *five* months, which also made a variance between the Record and Declaration. 3 Stark, 1597, 1602; 1 Chitty Pl. 4 Edit. 271, 3, 317; 2 M. & P. 130; Ry. & Mo. 93; Roscoe's Ev. 53; 2 B. & A. 472; 2 Stra. 1131.

3d. That the Defendant's contract was different to that set out; the declaration omitting the qualifying part of the deed, which limited the Defendant's undertaking to tan *all* the green

hides, &c. to a quantity not exceeding sixty hides and twenty-five skins. The omission, a material variance, and fatal on non est factum. 1 Chitty on Pl. 378, 316; 1 B. & C. 358; 5 J. B. Moore, 164; 4 Camp. 20; Roscoe's Ev. 52; 1 Saun. 234.

4th. A variance between the *Plea delivered* and the *Nisi Prius Record*. The Record set out the whole of the Deed as forming part of the Defendant's plea of non est factum; but the deed was not set forth in the plea delivered. Arch. Prac. 274; 2 B. and A. 472; 2 Wils, 166; 2 Str. 1131.

Stewart urged that all were material and fatal variances, and anticipating that a motion would be made to amend, referred to the Provincial Statute, 9th and 10th Geo. IV. c. 1, authorising the Judge at Nisi Prius to amend the Record and Pleadings in immaterial matters, contended that the Statute did not contemplate amendments in such cases as the present, and at all events it only applied to the variance noticed in the first objection if considered immaterial; that the others besides being material, were variances in the Declaration and Pleadings delivered, the power to amend which, only belonged to the Court above. 1 Stark, N. P. C. 74. That the power given to the Judge at Nisi Prius to make amendments was confined to the Nisi Prius Record, and the Pleadings, &c. as therein set forth, and he could only *look* at the Declaration and Pleadings delivered, to see if any variance existed between them and the Nisi Prius Record. Eng. Stat. 9 Geo. 4, c. 15; 1 M. and M. 253; 8 Bing. 230; 1 M. and M. 359; 3 C. and P. 594; 4 C. and P. 22, 24, 79.

Chandler, in reply, contended that the Judge at Nisi Prius, under the Provincial Statute, had power to amend all Pleadings, whether the errors were found in the Declaration or other Pleading *delivered*, or in the Nisi Prius Record, and as to the variances relied on in the first and second objections, he moved to amend them as being immaterial;—with respect to the third, he contended the limitation was in the nature of a proviso, and under the authority of 1 Chitty, 317, not necessary to be stated in the Declaration, but in substance the Declaration contained the limitation by the Plaintiff's averment in his second Breach, that he had sixty hides and twenty-five skins ready for Defendant to tan; that the objection might have been of some force if Plaintiff had alleged a larger quantity; but at all events, he urged if the qualification was necessary to be alleged in the Declaration, the Defendant could not take advantage of the omission on non est factum, he should have set out the deed and demurred. As to the fourth objection, he argued the deed was correctly entered on the Record, that the Defendant having craved Oyer, ought to have set out the deed in his Plea, and

he had virtually done so by the words, "it is read to him," &c. the "&c." meaning the words of the deed, and therefore the Plaintiff was justified in entering the Deed at length in place of the "&c." That in former times when the proceedings were ore tenus, the Defendant came into Court and heard the deed read to him upon which he pleaded to the action, and craving Oyer at the present day was in substance the same, the only difference being instead of hearing it read, he received a copy of the deed;—He therefore submitted that he was entitled to amend as to the first and second objections, the variances being immaterial, that the omission relied on in the third objection could not be taken advantage of on non est factum, and as to the last the Plaintiff was justified in entering the deed on the Nisi Prius Record.

CARTER, J. said he had listened with much anxiety to the argument on this motion, and felt himself compelled to decide that the second and third objections were valid; the variances noticed in these objections were material, and he did not think he could amend them, they were not such as in his opinion were contemplated by the statute;—he said he should have allowed the amendment as to the variance in the first objection, but those as to the *time*, and the qualification of the Defendant's undertaking, he considered to be material, and as they could not be amended were fatal on non est factum. In reply to a question by Plaintiff's Counsel, he said he also thought the variance referred to in the fourth objection a material one.

Nonsuit.

E. B. Chandler and *J. W. Weldon* for Plaintiff.

Alexander Stewart and *J. Stewart* for Defendant.

JACOB R. GRAY *vs.* CHARLES SHAMPER, IMPLEADED WITH W. HANNINGTON, Junior.

In this case which was Debt on an Agreement under Seal, before the Jury was sworn, *Chandler* for Plaintiff, moved for leave to amend the Nisi Prius Record, by striking out the agreement set forth as forming part of Defendant's plea of non est factum, the same not being set out in the Plea delivered, urging that until the decision in the last case, he was of opinion that it was correct so to enter the deed when a Defendant craved Oyer, and as in this case it had been entered under a misconception, it might be considered a mistake or misprision of the Clerk, and amendable without reference to the Provincial statute. He cited 2 Arch Prac. 274, Tit. amendment.

But CARTER, J. refused to interfere, or allow the amendment unless the Defendant chose to consent; he referred from memory to a late case, where Lord Tenterden had refused to allow amendments of this nature. The case was afterwards produced, 2 M. and M. 136, which confirmed the impression the Judge had of it, and he observed, Lord Tenterden's opinion was great authority in such cases.

The Record was withdrawn.

Alexander Stewart and *J. Stewart* for Plaintiff.

E. B. Chandler for Defendant.

GLOUCESTER CIRCUIT.

SEPTEMBER, 1835.

BEFORE PARKER J.

LEE *versus* SMITH.

Assumpsit—Summary.

The Plaintiff declared on a conditional acceptance, but did not aver a performance of the condition, and in his particulars stated "Defendant's acceptance of Daly's order in favor of Plaintiff."

End objected that the acceptance offered in evidence did not correspond with that charged in particulars.

PARKER, J.—The instrument is set out in the Declaration as a conditional acceptance, and therefore I think the particulars are sufficient, they could not mislead.

The Defendant's name was William Smith;—Napier, a witness, to prove the acceptance, stated that he knew two persons so named, one a Tavern Keeper, the other the Defendant, a Lumberer; he had seen each of them write; had dealings with both of them, and believed the acceptance exhibited to be the

handwriting of one of them, but could not determine which of them.

Another witness proved that the exhibit was not the handwriting of Smith, the Tavern Keeper.

Carman submitted, that this was sufficient evidence to go to the Jury.

End objected. That the testimony did not come within any of the Rules of Evidence, and was not sufficient to authenticate the exhibit.

PARKER, J.—It appears to me if there are two persons of the name of William Smith, the Defendant and another, and a witness swears the exhibit is the handwriting of one or the other of them, and it is otherwise proved not to be the handwriting of such other person, there is evidence to go to the Jury. The point is new to me, I have no recollection of any case in which such evidence has been tendered. I will receive it, and reserve the point, giving the Defendant leave to move for a non-suit, if the signature is not established by better proof.

William Smith, the Tavern Keeper, was afterwards called, and swore that the acceptance was not his writing.

Evidence of the performance of the condition was offered.

End objected, that the Plaintiff could not prove a fact, he had not averred.

PARKER, J.—I have no hesitation in saying, according to the ordinary rules of pleading, that the Declaration would be defective, but as this is a case under the Summary Law, in which the Declaration is inserted in the Writ, and the Plaintiff will not be entitled to recover on the contract set out without the proof now offered, I shall not reject it, although the averment has been omitted. The objection is on the Record, and the Defendant might have demurred.

Verdict for Plaintiff—damages, £10 : 1 : 6.

W. Carman for Plaintiff.
End for Defendant.

The case was not again moved.

REX *versus* M'GEE.

Indictment for Rape.

J. A. Street, Counsel for the prisoner, questioned the prosecutrix as to her having previously had connection with the prisoner and other persons by her own consent.

Peters, Cl. Cor. objected that it was not proper to question the witness as to particular facts, and cited Rex *vs.* Hodgson, Russell & Ryan, C. C. 211.

PARKER, J.—That decision is shaken by a late case in 6 Car. and Payne, 562, Rex *vs.* Martin, and it appears now that evidence of particular facts may be admitted.

There is one objection here which however would not occur in England; there the offence of fornication is not indictable, but being so in this province, the answer to the question in the affirmative, might tend to criminate the witness. I think in a case of this description, the questions should be put, but the witness will understand she is not bound to answer them.

NORTHUMBERLAND CIRCUIT.

SEPTEMBER, 1835.

BEFORE PARKER J.

GREEN *versus* TIERNEY.

Trespass for Assault and Battery.

On the part of the Plaintiff the Assault and Battery was proved; but the cause of commencement of the affray was not shewn. Evidence was also given of damage sustained by reason of the Plaintiff's consequent inability to pursue his occupation.

On the part of the Defendant, evidence was offered in mitigation of damages, of gross abuse by the Plaintiff of the Defendant's wife at the time of the assault and immediately previous thereto, on the same day and at the same place, which was the provocation that induced the assault.

J. A. Street objected, that it was evidence of a conversation, not between the parties, or in the presence of the Defendant.

PARKER, J.—It is part of the res-gestæ, and may be given in evidence in mitigation of damages and more especially as the Plaintiff has not shown the commencement of the affray or assault.

The Defendant offered evidence as to the habits of the Plaintiff as a man of industry or otherwise, previous to the assault.

J. A. Street objected, that the testimony was irrelevant, applying to general character, and not to the circumstances of the present case.

PARKER, J.—You have expressly gone for damages consequent upon the inability of the Plaintiff to carry on his business, and it is material the Jury should know what loss he has sustained by not being able to carry on his business; the evidence is therefore relevant and proper.

The verdict was for the Plaintiff, with *six pence* damages, and the Judge refused to certify under the Statute 22 & 23 Car. 2. c. 9, considering that although there was proof of battery, the granting or withholding of the Certificate was discretionary,* and the case did not call for a Certificate.

J. A. Street and *Kerr* for Plaintiff.

W. Carman for Defendant.

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* *It was so decided by the Supreme Court in Hilary*, 1834.

WILSON *versus* WILLOUGHBY.

Wilmot moved on the part of the Defendant to put off the trial of this cause on the ground of the absence of a witness; the application was resisted by *End* for Plaintiff.

PARKER, J.—There is a great difference between the requisites of Affidavits to put off trials, when the applicant has been guilty of laches or delay, and when he has not.

I always look at such applications with care and anxiety; they ought not to be favored, but it is material to the ends of justice that a party should not be hurried to trial in the absence of a material witness, if the party is not in fault in not having him present, and there is reasonable ground to expect his attendance or testimony at the next Circuit. I think the Affidavit in the present case is sufficient, and the cause must be put off on the usual terms.

I will suggest to the Bar, that as Commissions to examine witnesses abroad can be obtained on application to a Judge at Chambers, whenever a cause is at issue in which it is necessary, even if the Commission cannot be returned in time for the

Circuit, that an immediate application should be made for the Commission, which will save the trouble of carrying down the Record, and the expence of the attendance of witnesses.

THE QUEBEC AND HALIFAX STEAM NAVIGATION COMPANY,
versus
CUNARD AND ALLEN.

This was an action for money had and received, in which the Defendants obtained a verdict in September, 1834. That verdict was set aside in last Trinity Term, (*vide ante page* 33,) and the cause came down a second time for trial. The Plaintiffs claimed £113 : 15s. which the Defendants retained in their hands.

The case on the part of the Plaintiffs was much the same as on the former trial, except that the original account stated between the parties was produced by the Defendants on the requisition of the Plaintiffs. In that account, the Defendants charged, "*Agency and compensation for trouble in attending to the business of the Association on* 91 *Shares—at* £25 *each,* £2275, *at* 5 *per cent—*£113 : 15s." This item was reserved for further consideration, and all the rest of the account was settled. It appeared by the account rendered at the time of the settlement, in which the disputed item was charged, that £60 : 10s. part of the funds in the Defendants hands was received on account of the Shares, and was specified therein, as "the first instalment on eleven shares."

On the part of the Defendants, evidence was tendered, to shew the trouble and service of the Defendants, relative to the business of the Plaintiffs respecting the 91 shares generally.

J. A. Street and *Berton* for the Plaintiffs, objected that the Defendants should, before shewing their services, prove their retainer by the Plaintiffs, it having already been shewn on the part of the Plaintiffs that they were employed by the owners of the 91 Shares, and not by the Plaintiffs, and even if they could shew an express retainer by the Plaintiffs under the pleadings as they stood, the evidence would be inadmissible; the Defendants had pleaded only the General Issue, and had given no notice of set off, they had therefore rested their claim to the money in question solely on a right to retain. That claim applied to agency on the whole 91 shares, and having paid over the principal part of the amount, without any deduction for commission, they had themselves defeated that right.

End and *Wilmot* contra—contended that the Defendants were entitled to retain their commission as charged, out of any money in their hands, whether received from the same source or otherwise; and cited Roscoe's N. P. Ev. 250;—4 Burr, 2221.

PARKER, J.—The only evidence as to the trouble or services of the Defendants that is admissible is as to the first instalment on eleven shares, £60 : 10s., the amount in their hands at the time the charge was made. The Defendants cannot apply the £60 : 10s. to commission on the 91 shares; and their right to retain, if they have such a right, can apply only to a commission on that £60 : 10s. I speak after very full consideration, having given much attention to the point.

If the defendants had given notice of set off, they would have stood in a very different situation, and might be entitled to shew their retainer by the Plaintiffs and their services relative to the shares generally; but on the case as it stands they can only have a right to retain a commission on so much as remained in their hands, and not on any parts which they had paid over without making a charge or setting up a claim for commission.

The Defendants gave in evidence the letters of the Plaintiffs, and called witnesses for the purpose of establishing that the Defendants were the Agents of the Plaintiffs in the business of the Shares.

His Honor confined the Jury in the consideration of the Defendants' right to retain strictly to a commission on the £60 : 10s.; and left it to them to consider if in respect of that amount they were the Agents of the Plaintiffs or not.

The Jury returned a verdict for the Plaintiffs—damages, £95 10s. 9d.

J. A. Street, *Kerr*, and *Berton* for the Plaintiffs.

End and *Wilmot* for the Defendants.

REX *versus* ROGERS.

A Bill of Indictment for Robbery was found by the Grand Jury in the Northumberland Court of General Sessions, and at the present Assizes handed up to the Clerk of the Court of Oyer and Terminer.

Peters, Cl. Cor. moved that the Defendant should be called on his Recognizance, and arraigned.

PARKER, J.—Robbery is a crime taken out of the jurisdiction of the Courts of General Sessions of the Peace by the Act of Assembly, 1 W. 4, c. 14, consequently a Bill of Indictment for the crime, found in that Court, must be void.

The Defendant appearing in Court, His Honor refused to commit him, or to act in any way upon the Bill, but the recognizance being in general terms, and not applying to the Indictment, His Honor directed the same to stand for further consideration.

CARLETON CIRCUIT.

SEPTEMBER, 1835.

BEFORE PARKER, J.

DANIEL *versus* JOHNSTON.

This was an action of Assumpsit. The three first counts were on a special undertaking of the Defendant's to pay for goods to be furnished by Plaintiff to R. Smith & Co.; every material averment was laid *at Fredericton in the County of York.* There were also the usual common counts laid *at Woodstock in the County of Carleton.*

Wilmot opened for the Plaintiff, and rested his case on the undertaking set out in the special counts.

Berton, for the Defendans, moved for a non-suit; the subject matter of the Special counts having arisen in York County, was not triable by a Jury of Carleton; and the learned Counsel having put himself wholly upon the undertaking, had virtually abandoned the common counts.

The *Solicitor General* contra, admitted that the Plaintiff could not rest upon the special counts, but contended that the common counts were not abandoned, and offered evidence under the account stated of an account rendered to Defendant of goods furnished on the undertaking to Smith & Co.; but His Honor expressing an opinion that on the Counsel's opening, the

evidence offered was not admissible on the common counts; the Plaintiff submitted to be nonsuited.

The *Solicitor General* and *Wilmot* for Plaintiff.

Berton for Defendant.

WINSLOW *versus* JOHNSTON AND OTHERS.

The *Solicitor General* challenged the array on the following grounds appearing by Affidavit.

One William S. J. Dibblee was a party interested in the action. (The Plaintiff being the Sheriff of the County,) the distringas was directed to the Coroner, and the Jury was summoned, and the Writ returned by John Bedell, who was a second cousin of said Dibblee. Tidds Pr. 9th ed. 851.

PARKER, J.—The Affidavits do not state that the Coroner is connected with any party on record, but with a person who is interested. If it appeared that Dibblee was so immediately interested as to stand in the same place as the Plaintiff, the case might perhaps have been different; but the affidavits do not go to that extent, and I am by no means satisfied that the circumstance of the Coroner being a second cousin to a person interested in the event of the suit, is a sufficient ground of challenge to the array.

Dibblee and *Berton* for Plaintiff.

The *Solicitor General* and *Wilmot* for Defendants.

ADVERTISEMENT.

THE Annual Subscription for this Work will in future be *One Guinea* per annum, payable on the delivery of the Trinity Number. This amount and arrangement, it is hoped the Profession will not think unreasonable, when they consider the rapidly increasing number and importance of the cases and the expenditure of time and funds required in preparing and publishing them.

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CHRISTOPHER MILNER, Junr. -	Westmorland.

ACT OF ASSEMBLY.

6 Wm. 4. Cap. XIV.

An Act to provide for Reporting and Publishing the Decisions of the Supreme Court.

Passed 8th March, 1836.

'WHEREAS it is an object of great importance to obtain 'correct reports of the decisions of the Supreme Court 'in cases heard and determined in the said Court;'

I. Be it therefore enacted by the Lieutenant Governor, Legislative Council and Assembly, That His Excellency the Lieutenant Governor or Commander in Chief of this Province for the time being, by and with the advice of His Majesty's Executive Council, is hereby authorised to appoint some suitable person, learned in the law, to be a Reporter of the Opinions, Decisions, and Judgments, which may from time to time be given, made and pronounced, by the Supreme Court of Judicature in this Province, or the Judges thereof, in, upon or respecting causes pending or that may hereafter be pending therein; and that it shall be the duty of such Reporter, by his personal attendance, or by any other means in his power, to obtain true and authentic reports of such Opinions, Decisions and Judgments; and such Reporter shall publish not less than two hundred copies of the same in pamphlets after each term of the said Court.

II. And be it enacted, That the sole liberty of printing and reprinting, and publishing such reports, shall be and the same is hereby vested in and secured to the Author and Compiler thereof, his heirs and assigns; and if any person shall print, reprint or publish any such reports, without the consent of the Author and Compiler or Proprietor thereof, he shall be liable to an action on the case, at the suit of such Proprietor, in which

action such Proprietor shall recover double the damages he may have sustained by any such infringement of the copy right hereby secured to him.

III. And be it enacted, That in addition to any profits that may arise from the publication and sale of such reports, such Reporter shall receive annually from the Province Treasury the sum of fifty pounds, to be paid by warrant of His Excellency the Lieutenant Governor or Commander in Chief for the time being, on the certificate of the Chief Justice of the said Court that such Reporter has diligently performed the duties by this Act required of him for the year for which such allowance may be claimed.

IV. And be it enacted, That this Act shall be and continue in force for three years and no longer.

BY AUTHORITY.

CIVIL APPOINTMENT.

GEORGE F. S. BERTON, Esquire, to be Reporter of the Decisions in the Supreme Court.

Royal Gazette.

HILARY TERM,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

WIGGINS *vs.* WHITE, GARRISON, & WOODS.

Persons who jointly manufacture Timber, which it is agreed shall be divided between them, are not Partners, but Tenants in Common, or Joint Owners, and each has only a right to dispose of his own share.

QUERE.—*If any and what acts of a Tenant in Common or Joint Owner of a Chattel, other than a destruction of the property, will enable his Co-Tenant to maintain Trespass or Trover?*

This was an action of Trespass, for taking a quantity of timber, tried in last Trinity Term, before CHIPMAN, C. J.; the verdict was for the Defendants. A rule nisi to set aside the verdict having been obtained, the rule was argued in Michaelmas Term, and in this Term the Court pronounced their opinions.

The facts and circumstances of the case and the arguments of Counsel are fully detailed in the opinions of the Court, and are therefore omitted here.

CHIPMAN, C. J.—The only question which, I think, should be decided under the present circumstances of this case, is that which arises upon the construction of the following agreement, made between the Defendant Woods and one George A. Lockwood, and produced in evidence on the part of the Plaintiff:—

"This Agreement made and entered into this day, between George "A. Lockwood of the one part, and George Woods of the other part, "witnesseth; *the said Woods* is to make one thousand tons white "pine Timber on Little River at the Grand Falls—pay the Stumpage,

" (*each to pay half*, and *the said Woods to advance*,) and make said " Timber in such a place as not to have more than two miles to haul " on an average—*each* to find *equal* hands in cutting all main Roads " through the Timber and clearing the Stream sufficient to drive said " Timber—*and said Lockwood is to haul said quantity of one thousand* " *tons for one half on the brow. Each* party to find *equal* hands and " supplies to drive, raft and take the same to market. Said Woods " to take all defective Timber when re-examined at Saint John, and " said Lockwood to take any Timber that may remain in the woods of " the said quantity:—should he fail in hauling the whole quantity—and " should he be kept idle for want of Timber to haul, his time to be paid " for by the said Woods. For the true and faithful performance of " this agreement, each bind themselves unto the other in the penal sum " of five hundred pounds of lawful money of New-Brunswick.

" GEO. WOODS,
(Signed) " GEO. A. LOCKWOOD.

" Dated the 18th day of Oct. 1831.

" Witness present,
(Signed) " JOHN GRANT.

The parcel of Timber, which was in question in this cause, had been *made* by Woods and *hauled* by Lockwood, under this agreement. It was rafted and carried to market at Saint John, under circumstances which it is not at present necessary to advert to; and there it was taken by the Defendants Garrison and Woods from the Plaintiff, who was in possession thereof, having derived his title thereto from Lockwood. The Defendant Garrison was proved to be the Deputy of the Defendant White, he being the Sheriff of the City and County of Saint John, and Garrison was considered by the witness who spoke to this transaction, as acting in his capacity of Deputy Sheriff. *This taking* constituted the trespass complained of in this action.

The view taken of the agreement, at the trial, on the part of the Plaintiff, was, that it constituted a *partnership* between Woods and Lockwood in the Timber made and hauled under it—that Lockwood had a right, as partner, to dispose of the partnership property—that the sale by him, from which the Plaintiff derived his title, operated as a valid transfer of the whole property in the Timber in question, and that the Defendants were trespassers in taking the same from the Plaintiff.

On the part of the Defendants it was contended, at the trial, that Woods, as the maker of the Timber under the Licence from the Crown, which Licence they gave in evidence, had originally the sole property in him, which had never been changed; that Lockwood, by hauling the Timber, gained no property therein, but only a right to receive, as a remuneration for his labour in hauling the same, a certain portion of the Timber, and that, until Woods had allotted to him a specific part of the Timber, as payment for his services in this respect,

no *property* in any of the Timber vested in him: that no .ch allotment having been made, the sale by Lockwood did not alter the property in the Timber, which remained in Woods, and he, therefore, had a right to take his own property out of the Plaintiff's possession.

On the argument for a new trial, a new view of the agreement was presented by the learned Counsel for the Defendant, and it was contended by him, that if Woods was not the sole proprietor of the Timber in question, and if Lockwood had any right of property therein by virtue of the agreement, such right of property in Lockwood was at most that of a *Tenant in Common*, and not that of a *Partner*—that as Tenant in Common, Lockwood had only a right to dispose of his own undivided share, and, therefore, that the sale by him, under which the Plaintiff derived his title, operated only as a transfer of the property in *one undivided moiety* of the Timber, the property in the other undivided moiety still remaining in Woods.—Woods being, in this view of the case, a Tenant in Common with the Plaintiff, it was contended that the latter could not maintain Trespass against Woods for the bare act of taking the Timber, the common property of both, from the Plaintiff's possession.

Upon a review of the agreement, I am, in the first place, of opinion, that it cannot be maintained that Lockwood had not, by his acts under it, gained any property in the Timber in question. The most material stipulation on this point, is the following:—"said Lockwood is to haul said quantity of one "thousand tons *for the one half on the brow.*" It is further stipulated that "*each* party shall pay *one half the stumpage*," (the expression it would seem in common use among lumberers, for the purchase money of the timber paid to the proprietor of the land, in this case, the Crown.) And further, that *each* party is to find *equal* hands in cutting main roads and clearing the stream, and *equal* hands and supplies to drive, raft, and take the timber to market.

The expression, "*for the one half on the brow*," necessarily imports that the hauler is to have *the property* in one half on the brow. The price stipulated for this property being not merely the hauling, but his liability to pay one half of the stumpage, and to provide for an equal share of the other expences and labour specified in the agreement.

It is clear from the subsequent part of the agreement, that it was not intended that there should be a division of the timber on the brow. Each party is to bear equally the expence of conveying the whole timber from the brow to market, and it is not until the timber reaches Saint John that a division is

contemplated; and upon the division, Woods is to take all defective timber, and Lockwood to take any timber that may remain in the woods. An *undivided moiety* is therefore clearly the nature and extent of Lockwood's property and interest in the timber *on the brow* under the agreement; the property and interest in the other undivided moiety being in Woods.

Each of the parties to this Agreement, thus having the property in one undivided moiety of the timber on the brow; the next question is, whether under the *stipulations* of the Agreement, this common interest constituted a *partnership* between them.

In the case of Cooper vs. Eyre, 1 H. Bl. 37, it is laid down by Lord Loughborough, C. J. that "in order to constitute a "partnership, a communion of profit and loss is essential.— "The shares must be joint, though it is not necessary that they "should be equal. If the parties be jointly concerned in the "purchase, they must also be jointly concerned in the future "sale, otherwise they are not Partners." Let us look, then, at the agreement in the present case for the purpose of ascertaining whether it contains this essential condition of a community of profit and loss. The parties, it is true, are as we have seen, to be jointly interested, each in an undivided moiety, in the timber on the brow; they are to be jointly concerned in carrying the timber from the brow to the market. But when the timber reaches the market at St. John, it is not to be sold or disposed of for their *common* profit or loss; but on the contrary, as we have seen, a *division* is to take place according to the particular stipulations of the contract, and each party would thereupon have the *separate* profit or loss upon his own individual lot; and this circumstance it is, which is conclusive, to prevent the relation of partners arising between the parties to this Agreement, and to confine the nature of their common interest, to that of a mere tenancy in common, in the chattels which are the subject of it. Nor is this a mere technical distinction without a substantial difference. It is a general Rule of the Law of Partnership, that each Partner has a power, singly to dispose of the whole partnership effects; but a mere Tenant in Common, where the relation of partners does not exist, has a right only to dispose of his own share. And I apprehend, that it would be entirely at variance with the intent of this agreement, to consider it as giving to each party a right to dispose of the share and property of the other party, in the timber in which they had this undivided interest and possession. Upon the whole, I am clearly of opinion, that the parties to this agreement, Woods and Lockwood, were Tenants in Common, not Partners, in the timber, which is the subject of this suit, as it lay on the brow.

And here I think we should stop for the present, and let the case go to a new trial, in order that the *facts* may be investigated, under *this* view of the *rights* of the parties which was not taken on either side at the former trial. Such further investigation is, I think, essential to the ends of justice, for the attention neither of the parties nor of the Judge at that trial, having been directed to this view of the subject, the examination of the facts with reference to what now appear to be the true bearings of the case, was imperfect. This view of the case, moreover, might have elicited particular questions proper for the distinct consideration of the Jury; as for instance, whether there was before the sale by Lockwood, under which the Plaintiff claims, a severance of the tenancy in common, and a vesting of the *exclusive* property in the lot of timber in question, in him,—and if this were not the case, and the tenancy in common continued quite down to the taking of the timber by the Defendants, whether there were circumstances attendant upon this taking, which would give one Tenant in Common a right to maintain an action of trespass against his companion. As there is to be a further investigation of the case, I abstain from expressing any opinion whatever upon the effect of any evidence bearing upon these points at the former trial.

For the reasons I have stated, I think the rule for a new trial should be made absolute.

Botsford, J.—The question in this case must be governed by the agreement made between Woods and Lockwood, by the terms of which, Woods undertook to make one thousand tons of white pine timber, and Lockwood was to haul the same for one half on the brow:—the former was to be at the expense of making the timber, the latter to contribute his work and labour in hauling it, both were to be equally concerned in making roads and clearing the stream sufficiently for driving the timber; the stumpage, (so called,) was to be paid by both; but in the first instance to be advanced by Woods; the timber was to be rafted and taken to St. John at their joint expence, and when re-examined at that place, Woods was to take all the defective timber, and Lockwood all the timber that might have remained in the woods.

By this agreement it would appear that the timber was to have been divided between them at St. John, and not to have been sold on their joint account; they were not to share with one another in the profit or loss, each party was to have a distinct share or moiety of the timber, and they were not jointly interested in the future disposition or sale of it.—There was not that community of profit and loss which was held by Lord Loughborough in Cooper vs. Eyre, (1 H. Bl. 37,) as essential to

constitute a partnership. I am therefore of opinion that Woods and Lockwood were not Partners in this transaction, but Tenants in Common and Joint Owners of the timber on the brow, each entitled to one undivided moiety or half part thereof.

As it is clear that one Tenant in Common cannot lawfully dispose of the whole property held by him in common with another, but only of his own share or interest, it consequently follows that Lockwood could not sell more than his own undivided moiety or share of the raft in question to Dibblee, and that the Plaintiff who derived his right to the timber from Lockwood, through Dibblee, cannot be in a better situation, but must be considered as the purchaser of one undivided moiety of the raft, which Lockwood owned as Tenant in Common with Woods, whose right to the other undivided moiety had never been legally divested.

It is equally clear that one Tenant in Common cannot maintain trespass or trover against a Co-tenant. In Coke Lit. 199 and 323, it is laid down, that "if one Tenant in Common take all the chattel personal, the other hath no remedy by action, but may take them again."—In Brown vs. Hedges, (1 Salk, 290,) it was resolved, "one Joint Tenant, Tenant in Common or Parcener, cannot bring trover against another because the possession of one is the possession of both."

In Barnadiston vs. Chapman, (4 E. 121,) it was said, that, "when one Tenant in Common doth not destroy the thing in common, but only takes it out of the possession of the others and carries it away, there no action lies by the other Tenant in Common."

The case of Graves vs. Sawcer, in Sir J. Raym. Rep. 15, is to the same point.

Although the authorities deny the right of one Tenant in Common to maintain trespass or trover against a Co-tenant, there are some circumstances which have been alluded to by His Honor the Chief Justice, which make it necessary that this case should be sent to another Jury for further consideration.

CARTER, J.—As this case stands before the Court, the Plaintiff, Wiggins, must rest his case entirely on the interest of Lockwood, in the timber in question.

In order, therefore, to decide the case, it is necessary to ascertain clearly, what that interest was, under the agreement put in evidence by the Plaintiff.

In the course of the argument, three positions have been taken with respect to this point—1st. That Lockwood never had any property whatever in the timber, but was merely to receive a certain proportion in lieu of wages. 2d. That Woods and Lockwood, under the agreement, became Partners in the

transaction, and therefore a sale by Lockwood of the whole or any part was good against Woods; and—3d. That Lockwood and Woods were, under the terms of the agreement, Tenants in Common in the timber, and Lockwood, by a separate sale could only transfer his own interest in the timber.

With respect to the first position, viz. that the sole property in this timber was from first to last in Woods, it seems to me impossible to read the agreement, and for a moment think that such could have been the intention of the parties, or the legal effect of the words of the agreement, it seems to me quite clear, from that agreement, that, at all events, *on the brow*, there was a joint property in Woods and Lockwood in the timber which had been hauled; the stumpage money was ultimately to be paid jointly—the labour of cutting roads and clearing the stream was to be provided jointly, as also the labour of driving, rafting, and carrying to market; indeed, the whole expence and labour of getting the timber and carrying to market was to be joint, with this exception, that the whole of the making of the timber was to be done by Woods, and the whole of the hauling by Lockwood.

Smith vs. Watson, (2 B. and C. 401,) is an authority to shew that under the terms of this agreement, there was a joint interest in the timber. In that case it was decided that an agreement that a Broker, instead of brokerage, should receive a proportion of the profits arising from the sale of goods purchased by him for a merchant, he at the same time bearing a proportion of the losses, did not vest in the Broker any share in the goods so purchased, or in the proceeds. In that case, Mr. Justice Holroyd says, "If Sampson, (the merchant,) had in terms agreed that Gill, (the Broker,) should have that proportion *of the property itself*, it would no doubt have become the joint property of the two." Then comes the question, was the interest of the parties under this agreement a partnership or joint tenancy by which one can dispose of the whole property; or, a tenancy in common, under which each can only dispose of his own undivided moiety. The case of Barton vs. Williams, (5 B. and Ald. 395,) cited in the course of the argument, quite satisfies me that under this agreement Woods and Lockwood were Tenants in Common of the timber on the brow; the agreement contains no provision for that which is an essential ingredient in the formation of a partnership between two persons, inter se, viz. a participation in the profits and losses of the whole transaction, it contains no provision for a joint sale of the timber, or any division of the proceeds of such sale.

For these reasons, it appears to me that, under the agreement, Woods and Lockwood were Tenants in Common of the timber

on the brow; and it therefore becomes unnecessary to consider any argument founded on the doctrine of Mr. Justice Best, in Barton vs. Williams, in which he denies the right of each Partner to dispose of the whole partnership property, in the case of a partnership in a particular instance, and confines it to partnerships in trading concerns generally. It follows from this that unless a division of the property took place before the sale to Dibblee, Lockwood by that sale could only transfer his own rights to Dibblee, and therefore Dibblee would become Tenant in Common with Woods, and the same would follow with respect to Dibblee's assignee the Plaintiff in this action. This view of the case however, being one which was not considered at the trial, but which has been wholly suggested since, I quite agree that the case had better go back to a Jury in order that it may be fairly and properly decided.

PARKER, J.—I quite agree from the evidence reported to us by His Honor the Chief Justice, that the Defendant, Woods, was Tenant in Common of the timber in question with Lockwood, under whom the Plaintiff derives his right.—I think also as a general proposition, it cannot be disputed, that one Tenant in Common, Joint Tenant or Partner cannot maintain trover or trespass against another for the common property.—There is one exception, however, in the case of Tenants in Common, equally clear as the rule itself, namely, where there has been a destruction of the property; and it is a matter worthy of very serious consideration, whether any and what other acts—which so far as the interest of the parties is concerned, are equivalent to a destruction—can come within the limits of this exception. I had intended to have said more on this point, but as further remarks in the present state of the case would be considered extra-judicial, I forbear; I fully concur with His Honor the Chief Justice, and my brothers, that the case should go to a new trial, and for the reasons which have been stated by His Honor.

Rule absolute to set aside verdict.

The *Solicitor General* for Plaintiff.

N. Parker for Defendant.

CAMPBELL *versus* WILSON.

A verdict was taken for the Plaintiff for £1000, "subject to the award of Arbitrators, to be agreed upon." Plaintiff's expressed intention was to secure a verdict;

The reference was, "of all matters in the cause." The Arbitrators allowed the Defendant half the price of a vessel, sent by him and another to Plaintiff to sell, without any evidence of a sale by him.

Held 1st. Under the submission as explained by Affidavits, an award for the Defendant was bad, the power of the Arbitrators was confined to the quantum of damages.

Unless it appear distinctly on the Rule that Arbitrators may change a verdict, they shall not be held to have any such power.

2d. The Defendant's right of action, if any, on account of the vessel, was for a breach of duty in the Plaintiff as his Agent, and for unliquidated damages; the claim was therefore inadmissible, either as payment, or set off, and, having been allowed by the Arbitrators, vitiated the award.

A Rule Nisi was obtained in this cause in last Michaelmas Term, by the Solicitor General for the Plaintiff to set aside an award made in favor of the Defendant, on the grounds stated in the Affidavits recited in the opinion of the Court.

The cause was argued at this term.

CHIPMAN, C.J.—This is an application to set aside an award upon two grounds.

1st. That the Arbitrators made an award, and found a balance in favour of the Defendant, when they were only authorised by the submission, to reduce the verdict entered at Nisi Prius for the Plaintiff.

2d. That the Arbitrators took into their consideration a matter not referred to them.

As to the first ground,

Kinnear, the Plaintiff's Attorney, states in his Affidavit, "that during the sittings at Nisi Prius, a proposition was made by *N. Parker*, the Counsel for the Defendant, to arbitrate, which he, (Kinnear,) refused to accede to, but said he would agree to take a verdict for the amount claimed, subject to the award of three Arbitrators, chosen in the usual way; and at the same time remarked that he supposed the Defendant would not consent, as he claimed to owe the Plaintiff nothing; that Deponent's intention was to *secure a verdict for the Plaintiff, and that the Arbitrators should only have power to settle the amount of damages*, thinking the practice was so; that on the last day of the sittings, Mr. Parker mentioned that the Defendant *agreed to the Plaintiff's proposal*, and a memorandum was drawn up by Mr. Parker, whereby it was agreed, that a verdict should be

taken by consent, for £1000, subject to the award of three Arbitrators to be mutually agreed on," &c.

As the statement in this Affidavit is not contradicted, nor explained in the Affidavits on the other side, it must clearly be taken to have been the original understanding and agreement, that at all events there should be a verdict for the Plaintiff, and that the power of the Arbitrators should be confined to the *quantum* of damages.

An agreement or consent rule was afterwards drawn up in a more extended form, (and signed by the Plaintiff's Attorney and the Defendant,) whereby after reciting the terms of the first agreement, and that a verdict had been thereupon entered for the Plaintiff, the parties agreed to nominate James Keator, E. DeW. Ratchford, and Angus M'Kenzie, as the Arbitrators, and that their award, or the award of any two of them should be entered on the Postea, as the verdict of the Jury, and judgment thereupon with costs to be taxed, &c.

Now, although this consent rule is more full and particular in its expressions than the original memorandum, yet no intention appears on either side to vary the meaning and substance of this original memorandum.

If this Rule had formed the original agreement between the parties, and were to be construed by its terms alone, without reference to any extrinsic matter, I think a strong argument might be raised upon the clause, "*that the award should be entered on the Postea as the verdict of the Jury,*" that it was intended to subject the verdict itself to the award of the Arbitrators; but it is by no means clear that such would have been the effect of it. The practice of entering a verdict at Nisi Prius, previous to the submission to arbitration, has not by any means been so usual in this Province, as that of referring to arbitration generally, upon the condition that the award should be entered on the Postea as the verdict of a Jury, and therefore the effect of such previous entry of a verdict has not been much considered by the profession. But in construing Rules of reference, where a verdict has been entered at Nisi Prius, I should be disposed to hold most strictly in all future cases, that unless it appeared distinctly on the face of the Rule, that the Arbitrators should have power to change the verdict so entered, and cause a verdict to be entered for the opposite party, they should not be held to have any such power. Where such power may be intended to be given, it will be very easy to express it.

Under the circumstances of this case, as stated in the Affidavits, I think that upon the first ground, the Rule must be made absolute to set aside the award.

The second point, that the Arbitrators considered a matter not referred to them, is equally clear to set aside the award. The action is Assumpsit; the Plea was the General Issue, with which a notice of set off was given, as stated at the bar, in general terms.

The submission was of *all matters in the cause*, not of all matters in difference between the parties, and it was not competent to the Arbitrators to enter upon and consider any matter which would not have been receivable in evidence on a trial.

The subject matter which they improperly considered was the value of the brig Active, alleged to have been sent by Wilson the Defendant, and one Mackie, to the Plaintiff, to sell on their account. This evidence could have been made admissible, only, by proving a sale of the vessel to have been made by the Plaintiff. It was agreed, indeed, that the property in the vessel was jointly in Wilson and Mackie, and therefore was not a proper matter of set off by Wilson alone. But it is to be observed that the letter of instructions sent with the vessel, contemplates separate shares in the proceeds when sold. The essential defect is, that there is no evidence of the sale.

The expression in the Affidavit of the Arbitrator is, that only one half of *the value* of the vessel was allowed to Wilson; the Affidavits do not state that the vessel was sold, or that any evidence of sale was given before the Arbitrators. I take it for granted then, that there was no evidence of any such sale, and if the vessel was not sold according to the instructions, the Defendant's right of action, if he had any, would be, for a breach of duty in the Plaintiff as his Agent, and for unliquidated damages, which could not be considered, either as a payment or a set off, and admissible in evidence in this cause.

BOTSFORD, J.—I do not think under the circumstances of the present case, the Arbitrators were empowered to find for the Defendant. I am not clear, that apart from the undertaking which must be considered to have existed, the Arbitrators would have been justified by the strict terms of the Rule in so doing.

I agree with His Honor the Chief Justice that on both points the Rule should be absolute.

CARTER, J.—I had doubts as to the terms of the consent Rule, and I think from the mere terms of it, I can see a line of argument which would entitle the Arbitrators to find for the Defendant; but under all the circumstances, I am of opinion the award should be set aside, and in future, parties should state clearly and distinctly the powers they intend to vest in the Arbitrators.

On the second point also, I think the award should be set aside. It is clear the Arbitrators have considered the value of the ship as estimated by the owners; and it is equally clear that no evidence was produced before them of any sale, or the proceeds of any sale; it is quite consistent with all the evidence that Wilson and Mackie are still the owners of the ship.

Parker, J.—I agree also, that the award must be set aside, on both the grounds taken; and as the cause is of some amount and importance, I will take the liberty of stating my opinion at some length.

1st. As to the form of the Rule.—With this much of the argument of the Defendant's Counsel I agree; that were we called on to decide the case, on the mere literal construction of the Rule, my present impression is, that as the terms are general, and there is no restriction on that point, it would authorise a verdict to be entered for the Defendant; and for damages in his favour, if under his set off he were legally intitled to a balance. Again—if it had appeared that the Defendant's Counsel, when the proposition for a reference was made, on the basis of a verdict being entered for the Plaintiff, did not understand this condition, in the same manner as the Plaintiff's Attorney has sworn that he did; or afterwards, when the rules were entered into, he had conceived it agreed on both sides, that the Arbitrators were to have power to alter the verdict into one for the Defendant; the Court ought not, I think, to go out of the strict construction of the Rule. Further—if it were a matter of clear established practice, that a Rule in the form of the present would authorise a verdict for Defendant, whatever might have been the understanding of the Plaintiff's Attorney on the subject, I think nothing but a case of misconduct on the other side in obtaining it, would warrant the Court in disturbing it. But considering this an unsettled point of practice, there being in fact other forms of rules in the books so expressed as to be clear of the present objection (see 5 East. 139, and 1 Taun. 151,) and finding that what is distinctly sworn to on the Plaintiff's side as to the condition of the reference, has not been contradicted or varied by any counter affidavit; the Court ought in my opinion, to take all the circumstances into consideration, and having done so, are bound in the present case to set the award aside, which is, in fact, only placing the parties in the same position as they were when the reference was assented to. In so doing, I would observe that there is no comparison between the extent of injury which the Defendant sustains, in having this award set aside if right, and that, which would be inflicted on the Plaintiff in upholding it, if wrong.

I am well aware that a form of Rule might have been adopted, which would have secured to the Plaintiff a judgment in his favour, without any question; and for that reason, I think he was bound to make out a clear and strong case, to induce the Court to go out of the terms of the rule.

2d. As to the award itself—I heartily concur in the expediency and propriety of giving effect to awards, whenever we can do so with justice; but, I conceive, in order to induce parties to resort to this domestic tribunal, which (in many cases, and particularly those between merchants,) is enabled to settle differences more satisfactorily than Courts and Juries can do; it is necessary, carefully to examine their proceedings when properly brought before the Court, and not less important to set them aside when manifestly wrong, than to support them when right. Nay, I think it essential, that such a controul should be exercised, particularly as to references at Nisi Prius, where the award is to take the place of a verdict, in order that parties who have legal rights, may feel confidence and security in resorting to this mode of settling them. And no case calls more for the consideration of the Court, than one in which it is to be determined from the evidence before the Arbitrators, whether a matter in difference, on which they have acted and decided, was or was not included in the submission of a particular cause.

The material objection to the present award on the merits, is, that the Arbitrators have allowed the Defendant the value of one half the brig Active, (a certain deduction from vessel and cargo excepted;) that they have done this is admitted; and also that it was objected to by the Plaintiff; their power to do it therefore rests solely on the point of the notice of set off in the ordinary form, properly including this as an item of charge, recoverable in an action of common assumpsit. Was this so recoverable? It certainly was, if the vessel were sold by the Plaintiff; it certainly was not, if no such sale took place. It is not said there was any direct evidence of a sale, but it is insisted, that the facts afforded a sufficient presumption thereof, and that in the absence of any account, the Arbitrators had a right to charge the Plaintiff with the value. In order then to determine, whether the matter was submitted or not, we must examine the facts as brought before us; and giving full credit to all that has been stated on the Defendant's side in support of the award, I think sufficient has not been shewn to justify the presumption on which alone the question depends. It is important to observe that the nature of the property was such as to require certain forms, and rules in the transfer, which would make the proof of sale of a ship easier than that of other personal property; and that it has not been shewn, that the Plaintiff was vested with autho-

rity to make a legal transfer in regular form under the Registry Acts. In the absence of any evidence, to shew that the vessel was in fact sold at all, regularly or irregularly, of any legal power to transfer in the Plaintiff, of her ever having passed out of the possession of John Mackie, the Master, and other part owner, of her not being in existence at the present day, and the Defendant still vested with the legal right of owner, which would continue even if this award were to stand; I think the Arbitrators were not justified in presuming a sale, in order to charge the Plaintiff with the value under the set off. Something was said in the argument of its being a payment; but a payment is a satisfaction of an adverse demand; and, if the Defendant were entitled to any credit as an overpayment, the difference, if allowable at all, could only come in as a set off, but independently of this, there was nothing to shew that the vessel was to be a payment *in specie*, although the proceeds of sale might be so.

It has been further urged upon us, by the Defendant's Counsel, that Arbitrators are not bound by the same strict rules as govern Courts and Juries, and that they might, if it appeared to them on the evidence that the Plaintiff had deprived the Defendant of his property, allow him the value of it in this action, if he were entitled to recover it in another form of action. I need hardly advert to the different effect which a recovery in *tort*, and a recovery in this suit, would have on the property in the ship; and on this part of the case, it is sufficient to say that before Arbitrators should be allowed to take into their consideration, a demand not properly cognizable in the form of action submitted, it ought to be clearly shewn, either that the party originally agreed, or subsequently assented to their so doing; and that the facts were such as would entitle the party to recover in another action; none of which have, in my opinion, been made out in the present case;—I mean not to impute any intentional misconduct to the Arbitrators, who are admitted, on all hands, to be highly respectable and intelligent merchants; but it would have been more satisfactory, as they did not trust to their own judgment, but took legal advice, from which it is to be inferred that they meant to proceed according to Law, if they had communicated to the Plaintiff's Attorney, and now set out in the Affidavits, the opinion they received and the questions proposed; for, as the case is presented to us, they certainly went beyond their powers, and their award must be set aside.

Rule absolute.

The *Solicitor General* and *F. A. Kinnear* for the Plaintiff.

N. Parker for the Defendant.

SHAW *versus* GRANT.

If a Tenant in Common, with the consent of his Co-Tenant, ***sell more than his own share of the common property, he shall be considered in respect thereof to have acted as the Agent of his companion, and money had and received may be maintained against him.***

QUERE—***If the sale were without the consent of his Companion, if such action would be maintainable ?***

This was an action of Assumpsit, tried before CHIPMAN, C. J. in last Michaelmas Term. The Plaintiff charged in his particulars, *inter alia*, a sum of money had and received by the Defendant to the Plaintiff's use, as to which item,

It appeared in evidence that the Plaintiff and Defendant worked together in getting Timber in the winter of 1833—4, each furnished his own team, hired his own men, and procured his own supplies; they had no joint accounts; the timber was all put on the same brow, and rafted promiscuously in four joints. There was no evidence of any agreement as to the manner of working, or dividing the timber. When the timber was rafted, each took two joints; those taken by the Defendant contained the greatest quantity of timber. Plaintiff and Defendant met at Fredericton, on their way to St. John, to sell their timber, and some discussion took place in the presence of a third person, T. R. Robertson, as to the timber, when Grant said, "Shaw is to have half the whole timber at St. John," and also, "he is to half one half of the proceeds of the timber." The Surveyor who measured the timber being called to prove the quantities contained in the several joints,

Wilmot, for the Defendant, objected—that the Plaintiff and Defendant were Partners in the transaction, and therefore one could not sue the other until a division and settlement took place; and secondly, that the conversation in the presence of Robertson, amounted to a special agreement as to the disposal of the timber, which should have been specially set out in the Declaration.

Berton, contra—contended, that the parties were not partners in the transaction, and that the conversation proved, rendered Grant liable to the Plaintiff for money had and received, on proof of the sale of the timber.

CHIPMAN, C. J.—The relationship between the parties is that of Tenants in Common; and the question is, whether if one Tenant in Common have, or dispose of more than his share of the common chattels, his companion can maintain money had and received. As at present advised—I think he cannot.

Berton, for Plaintiff, then submitted that the evidence should be received (as the point was new and important), subject to a motion to reduce the verdict; which being acceded to,

It was proved that the two joints taken by the Plaintiff, contained 90 tons and 27 feet of timber, and those taken by the Defendant 109 tons and 12 feet, and that the Defendant sold the timber taken by him to one Hammond; the amount of the Plaintiff's claim for his proportion of the excess was agreed at £10 : 14s. and he thereupon had a verdict for £33, to be reduced to the sum of £22 : 6s. if the Court should be of opinion that this claim was not sustainable in this action.

Wilmot, in the same term, in moving for a Rule Nisi to reduce the verdict, took the following grounds:

1st. That the parties were Tenants in Common, and therefore the Plaintiff's claim was not sustainable at Law.

Smith vs. Oriell, 1 East. 368; Martin vs. Knowlys, 8 T. R. 145; Bovill vs. Hammond, 6 B. & C. 149, and 9 D. & R. 186.

2d. That money had and received could not be maintained, inasmuch, as it had not been shown that the Defendant had received money for the timber.

Nightingale vs. DeVeme, 5 Burr, 2589 and 2 W. Bl. Rep. 684; Harvey vs. Archbold, 5 D. & R. 500; 3 B. & C. 626, and R. & M. 184.

3d. The conversation in the presence of Robertson, if it amounted to any thing, constituted a special agreement, and was not evidence under a count for money had and received. Defendant was to account or deliver one half the timber.

Berton, for the Defendant, on a former day in this Term, shewed cause.

The Plaintiff and Defendant were Tenants in Common, each had a distinct property in an undivided half of the common chattel, and neither had any right to convert the whole to his own use. It was not necessary that an absolute destruction of the common property should take place, but a sale of the whole property by one Tenant in Common would equally constitute a conversion, and consequently Trover would be maintainable. Barton vs. Williams, 5 B. & A. 395, and the party might, if he pleased, waive the tort, and sue for money had and received. Willes, 209; Martin vs. Knowlys, 8 T. R. 146, 1 Chitty on Pleading, 45; Evans vs. Bennet, 1 Camp. 299; by the sale the joint interest was determined; but apart from so broad a position, the conversation in the present case constituted the Defendant the Agent of the Plaintiff; under that agreement he had a right to sell, and having sold, must be presumed to have sold for money, and was liable for money had and received.—

Wells vs. Ross, 7 Taun. 404; Spratt vs. Hobhouse, 4 Bing. 178; Longchamp vs. Kenny, 1 Doug. 137.

CHIPMAN, C. J.—This is a motion to reduce the verdict of the Jury under the following circumstances. The Plaintiff and Defendant were Tenants in Common of timber at Fredericton, when a conversation took place in the presence of the witness, Robertson. The timber was then undivided; each had two joints; those of the Defendant contained the most timber. The witness proved that Grant said, "one half the timber was Shaw's, and should be delivered accordingly at Saint John." He also said, "one half of the value of the timber was to be Shaw's."

The action is for money had and received; and a question has been raised, if this action can be maintained between these parties, for the value of one half the overplus quantity of timber sold by the Defendant, the whole amount of which overplus was £21 : 8s.

It was maintained by the Counsel for the Plaintiff, that if one Tenant in Common sell a larger portion of the common property than would fall to his share, an Assumpsit should be raised, and he should be made to account for the overplus to his Co-tenant, and that the proceeds of the sale would be money had and received in his hands to the use of his Co-tenant, to the amount of the share of the latter.

The authorities certainly go far to substantiate this position, but it is not necessary in the present case to decide that point. The conversation in Fredericton was quite sufficient to convey an authority from Shaw to Grant to sell the timber. In that conversation it must be considered to have been agreed between the parties that *Shaw should have one half of the value of the timber*: and this necessarily implies an assent on the part of Shaw that the timber should be sold by Grant.

It was proved that Grant did sell, and thereupon under the authority of Wells vs. Ross, 7 Taunt, 404, he must be taken to have sold for money. He therefore received Shaw's share of the proceeds as his Agent, and is liable in an action for money had and received to the use of Shaw.

BOTSFORD, J.—I am of the same opinion.—Grant took the timber to Saint John as Agent for Shaw, and sold it to Hammond, and thus as Agent is clearly liable to the action for money had and received.

CARTER J.—I think the conversation with Robertson, amounted to an authority to constitute Grant the Agent of Shaw.

The sale of the timber took place, and under the authority of Wells vs. Ross, money had and received well lies.

It is not necessary to decide the other point, whether if a Tenant in Common sells the joint property, money had and received, will lie by his Co-tenant for his share; but if the case in Willes is good Law, there can be no doubt upon the point, Chief Justice Willes' expression is very clear, and is certainly recognised by Lord Kenyon in 8 T. R.

PARKER, J.—Whether the Plaintiff would be entitled to recover the sum in question, in this form of action, if the sale of the timber had been made by the Defendant without the consent of the Plaintiff, I will at present offer no opinion, as I think the other ground is quite sufficient to sustain this verdict. The parties were Tenants in Common, and, as such, each had a right to dispose only of his own share; if, then, the Defendant sold the Plaintiff's share with his assent, which the evidence shewed, he may be fairly considered to have received the purchase money of such share as Agent for the Plaintiff, and is liable to him for the amount as money had and received. I cannot see any difference between a case of this sort and a sale of sole property; and I am glad that this decision settles the transaction between the parties as justice requires.

Rule discharged.

Berton for Plaintiff.

Wilmot for Defendant.

SPENCE *vs.* STEWART, IMPLEADED WITH THOMPSON.

On Nul Tiel Record, pleaded to debt on recognizance of Bail entered in the Charlotte Common Pleas, and Issue joined. The Court on the Trial, confined their consideration to the single point, "whether the Record produced, corresponded with the Record set forth in the Pleadings."

An Allegation under a videlicet, that a writ was sued out on a particular day, does not necessarily import that the day stated is the teste of the Writ.

CHIPMAN, C. J.—This was an action of Debt on a Recognizance of Bail entered and acknowledged in the Inferior Court of Common Pleas for the County of Charlotte. The Defendant pleaded, first, *Nul tiel record* of the Recognizance of Bail. Secondly, *Nul tiel record* of the Judgment set forth in the Declaration. Thirdly, no *Ca. Sa.* issued on the Judgment. The Plaintiff replied to the two first Pleas, respectively, "that there is such a Record," &c. which she prays may be inspected, &c.

To the first Plea she replied, that after the recovery of the Judgment, &c. and before the commencement of this suit, to-wit, on the 8th day of September, 1830, a *Ca. Sa.* was sued out, which she sets forth. To the replication to the third Plea, the Defendant rejoined, *Nul tiel record* of the *Ca. Sa.* to which rejoinder the Plaintiff surrejoined "that there is such a record of the Ca. Sa. which she prays may be inspected," &c. Upon these pleadings, the cause came on for trial by the Record by the Court at the last Term, and the tenor of the several Records put in issue was brought in by Writ of Certiorari, returned from the Inferior Court of Common Pleas for the County of Charlotte.

The Defendant's Counsel at the trial made no objection to the Record of the Recognizance and Judgment on the two first issues. On the issue arising from the third Plea, he objected, first, That the *Ca. Sa.* did not pursue the Judgment, the Judgment being for £567 19s. 2d. Debt, and £8 17s. 10d. costs, and the Writ of *Ca. Sa.* set forth in the Rejoinder, and sent up under the Certiorari, being for £72 9s. debt, and £8 17s. 10d. costs. Secondly, that by comparing the *teste* of the *Ca. Sa.* with the indorsement on the Writ, it appears to be tested on a day after it issued, viz. on the 17th September. With regard to these objections, whatever might have been the result of the *first*, if properly brought before the Court, the second is a matter of irregularity, of which advantage could be taken only by motion in the Court below, and neither of them can avail on this issue, which depends on the single point, whether the Record produced corresponds with the Record set forth in the pleadings. And this is to be ascertained by inspecting the Record brought in, which is so much a matter of mere comparison, that it appears to be the practice in the Court of King's Bench in England, that this inspection should be made by the Master, (2 Tidd's Practice, 744.) It is alleged in the Replication that after the recovery of the Judgment, and before the commencement of this action, viz. on the *eighth* day of September, 1st Wm. IV. the Plaintiff sued out a Writ of *Ca. Sa.*, by which said Writ, &c. setting forth the Writ,—and the Record produced corresponds with this Writ thus set forth. The Writ produced bears teste it is true on the *seventeenth* day of September, 1st Wm. IV. but I do not consider that the time of *suing out the Writ* therein alleged, especially as the allegation is under a *videlicet*, necessarily imports the day of the *teste* of the Writ. In the actual setting forth of the Writ in the subsequent part of the Plea, the *return* of the Writ is set forth, but the *teste* of the Writ is not set forth, and there is no variance between the Writ thus set forth and the Writ produced. I am

therefore of opinion, that the Writ produced supports the Plea on all the issues now under trial by the Court, and that upon these several issues there must be Judgment that the Plaintiff hath perfected the Record.

Botsford, J. concurred.

Carter, J.—The only question we are called on to decide in the shape in which this case is presented, is, whether or not there is a variance between the Writ of Capias ad Satisfaciendum, set out in the Replication and the Writ itself as sent up by the Court below:—If the 8th September mentioned in the allegation necessarily imported the teste of the writ, which on inspection appears to be the 17th September, I am inclined to think the variance would have been fatal on *Nul tiel record*, but on looking at the allegation, it appears to me that the material part of it is that the writ of Ca. Sa. was sued out after the recovery of the Judgment, and before the commencement of the suit, and the date is merely put in under a videlicet as matter of form, and does not at all import the *teste* of the Writ. I am of opinion therefore, that the Replication is supported, and Judgment must be for the Plaintiff.

Parker, J.—In my view of this case, the duty now assigned to us, is merely that of trying three distinct Issues, which have been joined by the parties on these pleadings; and for the proof of which, certain Records of another Court having jurisdiction in the matter are appealed to. On the first and second no question is now made. On the third the issue is not made up on the Plea and Replication, but substantially on the Replication and Rejoinder, and in my opinion the objections urged by the Defendant's Counsel do not properly arise in the present state of the Record. As to the first objection, the issue is not whether a *Ca. Sa.* was duly sued out on the Judgment, but whether a particular *Ca. Sa.* as averred in the Replication was in fact issued and returned; and if it appear by inspection of the Record of the Inferior Court that this was done, the averment is proved. It is true the Ca. Sa. set out does not follow the Judgment, it being for a much smaller sum, but that objection is, I conceive, completely waived by the course the Defendant has taken. Let us for an instant suppose the parties before us giving in their pleadings *ore tenus*. The Plaintiff first says, the Defendant owes me £567 19s. 2d. as he was special Bail for one Ebenezer Tuttle, at my suit against whom I obtained Judgment in the Charlotte County Common Pleas; and who was not rendered according to the undertaking of the Bail. Defendant answers:—No; I am not liable, for though I did become Special Bail, and though you did recover Judgment as you allege, no Ca. Sa. against Tuttle

was duly issued or returned. The Plaintiff not making an issue on this, replies:—A Ca. Sa. was sued out on that Judgment against the principal on the 2d September, returnable, &c. for £72 9s. debt, and £8 17s. 10d. damages; the same was delivered on the said 2d September to the Sheriff of Charlotte, and was returned by him *non est inventus*, as by the said Ca. Sa. and return, duly filed of record in the said Inferior Court will more fully appear. On this, several courses were open to the Defendant; I will not say which would have been the most advisable, but it is clear, if he simply deny that such a Ca. Sa. was issued and returned, he puts the case on that fact. That he has done in his Rejoinder; the Plaintiff surrejoins and produces the Record of a Ca. Sa. from the Inferior Court, which on inspection is found to correspond with his Replication, and we are bound to pronounce the allegation proved. As the pleadings stand, I agree with His Honor the Chief Justice that the point of variance with regard to the *teste*, is not brought distinctly up. Had the whole Writ been set out in the Replication, or on Oyer in the Rejoinder, it might perhaps have been taken advantage of; but as it is a question of practice of another Court, I have doubts whether even then we should be bound judicially to notice, that the day of issuing must necessarily mean the Teste, in opposition to the real time. See Sandon vs. Proctor, 7 B. & C. 800, and the case there cited. As the case stands, there must be

Judgment as to all the Issues, that the Plaintiff hath perfected the Record.

F. A. Kinnear for Plaintiff.
J. W. Chandler for Defendant.

RAYMOND AND ANOTHER *versus* LUKE.

If a cause be referred to three Arbitrators, with a stipulation that any two may make an award; and two of them meet, without notice to the third, and make an award, such award is irregular.

This cause was referred by Rule of Court to three Arbitrators, 'the decision of whom or any two of whom should be final.'

Weldon moved to set aside an Award made by two of them, on the following grounds, as stated in the Affidavit of the third Arbitrator.

The three Arbitrators met and completed the examination of evidence; they met to consider and make up their award.

One dissented from the opinion of Deponent and the other Arbitrator, and left them, declaring his intention to act no further in the reference. Deponent and the other deliberated further, and adjourned with an understanding that they would have another meeting, of which their absent companion should have notice.

Deponent was not further consulted, the other two brought to him an award they had made up and signed, and requested him to sign it also, which he refused to do.

He cited 2d Vern. 19, Ruton vs. Knight; 2 Chitty's Gen. Practice, 119; and Goodwin vs. Sayres, 2 Jac. and W. 249.

A Rule Nisi having been obtained, *Chandler* now shewed cause.

The Rule submitted the cause to the decision of three persons, or any two of them. All attended and heard the evidence; they deliberated upon the case, and afterwards two made their award, and it was no ground to disturb it, that the third Arbitrator dissented from it.

[Chief Justice.—Ought they not to be altogether (or notice be given to the absent person) until they agreed to disagree.] They had finished their deliberations, and merely went to the dissenting arbitrator to execute the award.

Weldon, in support of the Rule, was stopped by the Court.

Per Curiam.

The doctrine laid down in Goodman vs. Sayres, that if two Arbitrators out of three meet alone, excluding the third, or not giving him notice, it is irregular, and will vitiate the proceedings, must govern this case.

Here it appears when the *three* Arbitrators last assembled, a further meeting was contemplated, and such a meeting was in fact held by *two* without notice to the third. The Rule must be held strictly, that every Arbitrator who takes upon himself the burden of the reference, and consents to act, must be present, or have notice of the meetings of his co-Arbitrators. It is impossible to say what arguments might be used by the absent person to change the opinions of the others.—It would strike at the root of all just judgment to suppose that an Arbitrator before the final decision of the question, had so made up his mind as to exclude argument.

Rule absolute.

E. B. Chandler for Plaintiff.

Weldon for Defendant.

TURNER *versus* ELLIOTT.

IN ERROR.

From the Inferior Court of Common Pleas for the County of Westmorland.

A general release to an interested person, "excepting a certain Judgment in the Releasor's favor," held sufficient to make such person a competent witness, it not appearing that the Judgment related to the matter in question.

The Defendant in error, sued the Plaintiff in error in the Court below, in an action of Special Assumpsit. The cause was tried in that Court in November, 1834.

It appeared in evidence at the trial, on the part of the then Plaintiff that the then Defendant (the Plaintiff in error,) was owner of a vessel, and engaged with the Plaintiff to carry certain goods for freight from New Horton Flats to the City of Saint John. The goods were accordingly shipped; Edward Buck was master of the vessel, which sailed on her purposed voyage, and proceeded to Saint John; that the said Edward Buck did not there deliver the goods to the Plaintiff, but sold and converted them to his own use.

The Defendant thereupon in his defence offered and produced the said Edward Buck as a witness on his behalf, to prove both the carrying and delivery of the goods according to the agreement;

Whereupon the Counsel for the Plaintiff insisted that Buck was not a competent witness for the Defendant to prove the matters proposed, by reason of his interest as master of the vessel in the question at issue; whereupon the Defendant's Counsel produced a Release, duly executed by the Defendant to the said Buck—releasing him "from all and all manner of debts dues, demands, claims, sum and sums of money due, or owing by or from him the said Edward Buck to the said Defendant, and all manner of action and actions, cause and causes of action, from the beginning of the world to the day of the date, *except a certain Judgment in the Inferior Court of Common Pleas in the County of Westmorland in the said Defendant's favor,*" and insisted that such Release restored the competency and rendered Buck a competent witness for the purposes proposed, but to this,

The Plaintiff's Counsel replied that the Release was insufficient to restore the competency—and the Justices delivered their opinion that the said Edward Buck was not a competent witness; and that such Release did not restore or make him a

competent witness on behalf of the Defendant; and thereupon refused and rejected his testimony, and with that opinion and direction left the cause to the Jury, who gave their verdict for the Plaintiff for £15 2s. 6d. damages.

A Bill of exceptions having been tendered and allowed, the proceedings were brought into this Court by Writ of Error.

E. B. Chandler for Plaintiff in Error:

The competency of the witness could be restored by release, 1 Phil. Ev. 125; Rosc. N. P. Ev. 96–7. Whenever a witness can be released, he is made competent by the release, and any objection goes only to his credibility. The question therefore is as to the sufficiency of the Release. The instrument tendered was sufficient to release the witness from any liability to the owner of the vessel, the cause of action as between the Releasor and Releasee (now) had already accrued and was complete, and therefore was discharged by the Release. Bac. Abr. Rel. 2.

The *Solicitor General* for Defendant in Error. The witness may be released, but it must be by such an instrument as will remove any liability he may be under by reason of the subject matter in which he is to be a witness; nor was it necessary for the owner of the vessel to wait until action brought against him or until he had suffered loss by the conduct of the master; his right of action had already accrued, but the question must turn upon the sufficiency of the instrument. In this Release a Judgment is excepted, and for aught that appears the action in which that Judgment was obtained may have related to the very cause in which his testimony was required; [CHIEF JUSTICE.—If so, the Witness was competent without a Release.] but that Judgment may have been by confession, with a defeasance relating to this action and its event, or it may have been an interlocutory Judgment; and taking into consideration the position of the parties and the want of explanation, it is fair to presume that the Witness was not fully released. General words in a Release shall be qualified by special words. Stark. Ev. 1291.

CHIPMAN, C. J.—The true criterion of exclusion is, if the Verdict to be given in the case in hand, can be evidence for or against the witness, in any subsequent trial; and if the owner of the vessel had already recovered a Judgment, then the Verdict would no longer affect the witness. The point before the Court, is narrowed, to the import of the terms of the exception in the Release, and upon that I entertain no doubt; the words of the exception are "except a certain Judgment," &c. these words import a final Judgment, and even if it were for this cause of action, it would not be a necessary consequence that it was conditional or subject to the determination of this action.

It is said there might have been fraud or collusion between the Releasor and the Releasee, that might have been shewn, but cannot be presumed. Then it is urged that the judgment excepted may have been only interlocutory, but we are not to presume this against the natural import of the term. It was open for the party objecting to have shewn by evidence that the judgment was merely interlocutory; we will adhere to the natural meaning of the language, especially in a Release, where every thing must be taken most strongly against the Releasor, the effect of which would be to extend the general words, and to narrow the exception.

BOTSFORD J.—Concurred

CARTER J.—The only ground to render the Release inoperative, is to suppose the Judgment excepted was an interlocutory Judgment—or that being a final Judgment, it related to this cause of action, and was affected by fraud or collusion: either of these circumstances might have been proved, but we should carry the doctrine of presumption much too far, in the absence of any evidence, to support either supposition.

PARKER J.—There can be no question that the witness Buck was incompetent without, but could be made competent by a sufficient Release. It is said the Release does not cover all demands, but excepts a Judgment which might relate to the present cause of action; nothing however of that kind appears on the face of the instrument, and, *prima facie*, the Judgment has no relation to the cause of action in the present case. The party objecting, might have had the witness sworn on his *voire dire*, and have shewn the relation which the excepted Judgment had, if any. Not having done so, he could not, I think, call upon the Court to make that presumption so as to destroy the effect of the Release.

Judgment for Plaintiff in Error.

Chandler for Plaintiff in Error.

The *Solicitor General* for Defendant.

REILLY *versus* GILLAN.

An award will not be disturbed, because, the witnesses were examined without being sworn, although the Rule of Reference required them to be sworn, if the party objecting to the award were present, and consented to such examination.

In last Michaelmas Term, *Robinson* for Plaintiff obtained a Rule Nisi to set aside an award made by the arbitrators to

whom the cause was referred. The terms of the submission were that the witnesses should be examined on oath. The Plaintiff's affidavit, on which the Rule was granted, stated that the witnesses, contrary to his expressed wish and protestation, were examined without being sworn, and that the Plaintiff's wife, from whom he lived apart, was also examined, contrary also to his protestation and remonstrance.

The *Solicitor General*, for the Defendant, now shewed cause and produced the affidavits of two of the Arbitrators, which directly contradicted the statement of the Plaintiff as to swearing the witnesses. The Plaintiff's own witnesses were first examined, and without being sworn. The Plaintiff was present at the examination of his wife, and did not object, and the Arbitrators expressly swore, that her testimony was immaterial, and without it, their award would have been the same as they had made.

PER CURIAM.—The Plaintiff must be considered, as having consented to the examination of the witnesses without their being sworn, inasmuch as his own witnesses were first examined in that manner. The wife could not properly be examined, without the consent of the Plaintiff; he was present however, and did not object to it, and, as it appears by the positive statement of the Arbitrators, that her testimony did not alter their opinion, and that they would have made the same award without it, there remains no reason for disturbing the award.

Rule discharged.

D. L. Robinson for the Plaintiff.

The *Solicitor General* for Defendant.

DOUGLAS *versus* HANSON.

Plaintiff before action brought, rendered Defendant an account amounting to £63, reduced by credits therein to less than £20; Defendant did not admit the balance.

Plaintiff sued for the whole amount, and recovered a balance of £16 15s. 3d.; Defendant at the trial gave in evidence the account rendered, and sought further to reduce the balance. Held that Plaintiff was entitled to full Costs.

J. W. Chandler, for the Defendant, obtained in Michaelmas Term last a Rule Nisi for taxing the Plaintiff's costs, on the scale of the Inferior Courts, according to the practice of the Court when the action is brought for a sum under £20; on an Affidavit of *S. G. Andrews*, the Defendant's Attorney, which

stated that the action was common Assumpsit, was tried at the last Charlotte Circuit, and a verdict obtained by the Plaintiff for £11.

N. Parker, for Plaintiff, now appeared to shew cause.

BOTSFORD, J.—Reported the case, by which it appeared that the action was brought for goods sold and delivered, amounting to £63 14s. 6d.; that prior to the action, the Plaintiff had rendered an account of the above to the Defendant, in which account were contained sundry credits, amounting to £46 19s. 3d. making the balance £16 15s. 3d.; that the Defendant had admitted the correctness of the debit side, but disputed that of the credit side; and instead of relying on the account as stated and settled, had given a notice and particulars of set off, amounting to £78 18s. 6d. on which he went into evidence.

The Action was brought before the passing of the Act 4, Wm. 4, c. 41, establishing a Summary Practice in the Supreme Court.

The Court were clearly of opinion that there was no ground for the motion, as the Defendant had made it necessary for the Plaintiff to proceed for his whole demand; and the Defendant had no pretence now to set up the account as stated and settled, which he had refused to abide by.

Rule discharged.

DOE EX DEM HOWE *versus* MEALLY.

An Attachment against a Witness for Contempt in not attending on a Subpœna, must be applied for at the Term next after the Contempt committed.

The *Solicitor General* moved for an attachment against Duston Woodbury, a witness subpœnaed in this cause, at the Charlotte Circuit in August last. The witness attended, and afterwards absented himself, he was called on his Subpœna.

On reference to 3 Chitty's Gen. Prac. 834, & 3 Bing. 223, Thorpe *v.* Graham. The Court refused the application, it not having been made at the first term after the Circuit.

PALMER, FOSTER AND SIX OTHERS *versus* LONG.

When a number of persons jointly agree with another as to any particular matter, the agreement or contract can only be rescinded or put an end to by the consent of all.

Indebitatus Assumpsit, for work and labour in and about Defendant's ship; the declaration contained the common counts: Plea, General Issue, and notice of set off; but Defendant not having complied with a Judge's order for particulars, was precluded from going into evidence of his set off.

On the part of the Plaintiffs, a special agreement between the Plaintiffs and Defendant was proved, by which it appeared that if the Defendant failed in paying either the first or second instalment of a certain sum therein mentioned, the Plaintiffs should be at liberty to quit, and rescind the whole contract; holding the Defendant answerable for the work done. It was proved that the Plaintiffs worked for the Defendant under that agreement, and the Defendant failed in making payment agreeably to the contract,—that it was rescinded by the parties about the 24th July, 1832,—that work had been done about the Defendant's ship from February to July, and some extra work, which jointly formed the subject matter of the action.

The defence was, that before action brought, the Defendant had settled with six of the Plaintiffs acting on behalf of all, who gave the Defendant a discharge of all claims, both under the special agreement and for work and labour done. An agreement dated 28th July, 1832, signed by the Defendant and six of the Plaintiffs, was given in evidence, which specified "that the special contract had been and was given up, and "rendered null and void; that the Plaintiffs were to be paid "*monthly wages during the said time* the said Plaintiffs had "been at said work, according to the account of their time kept "by Mr. John Lobey. That the Plaintiffs renounced all "claim upon the ship, and gave her up to the Defendant, who "agreed to accept her, and pay the Plaintiffs for the time "they had been at work at her." A letter written by Robert Lobey, and signed by Lobey on behalf of the said six Plaintiffs, was proved to have been sent by two of the Plaintiffs to the Plaintiffs' Attorney, (notice to produce had been given,) desiring "that all proceedings against the Defendant might be "stopped on a certain contract for building Defendant's ship, "as they had settled with Defendant all differences relative "thereto," also cautioning him "not to commence any action

"in their names against Defendant at the instance of Palmer, "as they would not recognise any such proceedings, *and to* "*transmit his account, the amount of which they would pay.*" It was proved that Palmer and Foster, the two remaining Plaintiffs, did not agree to these arrangements, but that the papers were executed during their absence, and against their will; that neither the contract nor its contents were sent to the Attorney; that Palmer and Foster had never been paid their proportions of the work and labour, and that the amounts due them remained unpaid by the Defendant;—the amounts due the other six Plaintiffs had been paid. The object of the Defendant in taking possession of the special contract was to prevent them or any of the other Plaintiffs from bringing an action thereon.

Chandler, in support of motion for Nonsuit, contended, that as this was a partnership concern, the agreement of 28th July, 1832, coupled with the letter to the Attorney of the Plaintiffs, was a discharge of Plaintiffs' claim, and that, therefore, no action could be sustained. 5 Stark. 1068. Roscoe Ev. 184. 12 East. 317. 1 Stark. R. 102. 2 Camp. 561. Gow on Partnership, 141, 202. And further, that the papers of 28th July, 1832, operated as a severance of Plaintiffs' claim under the special contract, and vested a separate right of action in each; that the payment of the then respective shares to six of the Plaintiffs, could not be deemed a payment to the other two, therefore that Palmer and Foster could recover their respective proportions by actions in their own names.

Stewart, in reply, contended, the agreement of 28th July, 1832, was a mere arrangement for the payment, and although probably rescinding the special contract, yet did not destroy the Joint interest of the Plaintiffs; that the Plaintiffs did not declare on the special contract, considering it as rescinded, but that they resorted to the Indebitatus Assumpsit, which the law implied with the Defendant, for their joint work; that the special contract was merely, therefore, used for the purpose of ascertaining the proportion and mode of payment of the eight Joint Contractors; that the testimony of Defendant's witness shewed that Palmer and Foster had not been paid. As to the letter, it was a mere direction to the Plaintiffs' Attorney to suspend proceedings; it might be made a question between the Plaintiffs and their Attorney, but could not affect Paintiffs' claim against the Defendant—it could not be considered a release or discharge to Defendant, and evidenced no statement or payment by Defendant. It was not pretended that the six Plaintiffs who were paid their monthly wages, settled for Palmer and Foster; the receipts being after action brought, were evidence

to reduce the damages, and they only shewed payments of individual proportions according to the agreement of 28th July, 1832.—The authority adduced was a case where a debtor *had agreed* to a severance of the joint debt between joint creditors, which, although it vested a separate right of action in each, did not preclude the creditors bringing one joint action; but the debtor who assented to a severance, was estopped by his own act from asserting a joint debt. 2 Saun. Pl. & Ev. 714. 3d B. & C. 421.

CARTER J. suggested that the parties had better agree that the Plaintiffs should take a verdict for a certain sum, reserving the points for the opinion of the Court above, on a motion for a nonsuit, which was agreed to, and the Plaintiffs had a verdict for £20.

A rule *Nisi* to set aside the verdict was obtained in Michaelmas Term, and the points were argued at this Term by *Chandler* for the Defendant, and the *Solicitor General* for the Plaintiffs—the Court gave Judgment at the close of the argument.

CHIPMAN, C. J.—It does not appear that any time is wanted for consideration in this cause.

A Joint Contract was entered into by eight persons with the Defendant for building a ship, and six of those eight persons afterwards agreed with the Defendant to put an end to the former contract. Now, if the contract had been put an end to, these eight contractors would have been entitled to an action on the *quantum meruit*; but the question is, if the joint Contract were put an end to.

It is clear, that when a number of persons jointly agree with another as to any particular matter, no number of those persons can end the agreement or contract unless all consent. Here the agreement to put an end to the original contract, was made by only six of the eight Joint Contractors; and I do not consider they had a right to destroy the remedy of the other two.

Then as to the Receipts: there might be reasons why the other two did not consent to the agreement; the settlement made may not have been a fair one, and unless they had all agreed to rescind the relation of Partnership, as I have before said, that relationship must have continued. Then the joint Contract remaining in force when these receipts were given, the receipts must be considered under the particular circumstances of the case. The substantial matter of these imports, that the six who agreed to rescind, had been paid according to the time they had worked, and the Court will look to the substantial effect of them; having been given, therefore, under the agreement, they are to be received only *pro tanto* to reduce the whole amount of the claim of all the eight.

No injustice can be done by this view of the subject. These parties, although they sue jointly, recover only the balance, deducting the payments; and the apportionment of that balance, is a matter for them to settle among themselves.

If parties names be improperly used, they may apply to a Court of Equity to prevent it *ut inter se*, but that does not affect the rights of joint parties as to others. Great injustice would be done by allowing Long by an agreement with six of the Plaintiffs to defeat the joint claims of the other two.

Botsford, J.—I take the same view of the subject. An agreement was made between eight persons, the Plaintiffs, and the Defendant, to build a ship. Under the agreement they performed labour on the ship; afterwards, on the 28th July, 1832, six of those persons, leaving out Palmer and Foster, agreed with Long to rescind the agreement, and made a settlement for the amount of their labour respectively, and on the same day a letter was addressed to the Plaintiffs' Attorney, directing him to stop proceedings. They appear to have combined with Long to settle, and perhaps for the purpose of throwing out Palmer and Foster. There is fair ground to infer connivance for that purpose; and I think another inference is, that proceedings had been already commenced in this action, the instructions in that letter were *to stay proceedings*. Now, eight persons having contracted, six could not rescind the agreement, without the approbation of the other two. Is it not just that the other two should use the names of the eight to recover the amounts due to them? The receipts are only evidence *pro tanto*.

If Palmer and Foster had brought separate actions, the receipts might, and, I think, would have stopped Long from setting up the joint Contract; but it does not, therefore, follow, that the balances due cannot be recovered in the action by the whole eight.

Carter, J. concurred.

Parker, J. having been formerly engaged in the cause at the Bar, gave no opinion.

Rule discharged.

The *Solicitor General*, *Stewart* and *Weldon* for Plaintiffs.
E. B. Chandler for Defendant.

KEYS *versus* FLINN.

Under very peculiar circumstances the Court set aside a Verdict for the Plaintiff—the weight of evidence being in favor of the Defendant, and the Verdict evidently the result of a compromise.

This was an action of Assumpsit, for Goods sold and delivered and money had and received, tried before PARKER, J. at the last Northumberland Circuit, in which a Verdict having been returned for Two Hundred Pounds, in favor of the Plaintiff, a Rule *Nisi* was obtained by *J. A. Street*, in Hilary Term to set the Verdict aside, and grant a new trial on the grounds of the same being contrary to evidence and the Judges charge—cause was shewn in this term by *Wilmot* for the Plaintiff. The circumstances of the case were very peculiar; there was evidence on the part of the Plaintiff, of considerable property having been transfered by him to the Defendant; and of a large sum of money being paid into the Defendants hands for Plaintiff's account; the Defendant gave evidence of several payments made by him for the Plaintiff—he also endeavoured to impeach the testimony of the Plaintiff's principal witness, but principally relied on declarations both written and verbal, made by the Plaintiff; one, even as recent as the day before the trial, that the Defendant owed him nothing, and that the suit was not carried on by his directions. These declarations were attempted to be accounted for by the Plaintiff's mental imbecility of which there was some, though not very clear, evidence. It was late in the evening before the evidence was concluded, at which time the learned Judge proposed an adjournment to the next day, but the Jury, most of whom were *talesmen*, stating that they could not attend at that time without great inconvenience, the Counsel on both sides agreed to waive the privilege of addressing the Jury, and united in a request to the Judge, to sum up the cause without hearing Counsel, to which His Honor very reluctantly consented, deeming it a case which peculiarly called for their assistance in closing, as it was opened very briefly. In charging the Jury, His Honor read over to them the whole evidence, and left the case rather favourably for the Defendant, considering, that even if the Plaintiff's witness were entitled to credit, the Plaintiff's declarations would be a sufficient answer to the action, unless it appeared that at the time of making them he was from imbecility of mind, or otherwise the dupe of the Defendant; and His Honor adverted to the circumstance, that he had particularly called the attention of the Plaintiff's Counsel to the im-

portance of giving distinct evidence on that head, which he offered to receive after the Defendants case had closed. If these declarations were got rid of, and the Plaintiff's witnesses were believed, the state of the accounts between the parties, shewed a balance in his favour of about £400, or over. Another question arose, as to whether the whole transaction between the parties, was not entered into with a view to defraud the Plaintiff's Creditors; and His Honor stated his opinion to the Jury, that if such were the case, the Plaintiff ought not to recover, there being nothing to shew that the Creditors were at all concerned in carrying on this action.

The Jury retired between 11 and 12 o'clock, and were out the whole night, and part of the next day, before they could agree, and then brought in a Verdict of £200, which would not accord with the evidence on either side.

Under the very peculiar circumstances of this case (of which it is not necessary to give a more particular detail at present,) the Court made the Rule for a new trial absolute on payment of costs, considering it a proper case for investigation before another Jury; especially as the weight of the testimony was in favour of the Defendant; the Plaintiff's declarations that the Defendant was not indebted to him, having been established by several witnesses, and the state of his mind, if that afforded a sufficient answer to these declarations, admitting of more satisfactory evidence, than was given at the former trial. The amount of the Verdict also appeared, the result of a compromise, and not in accordance with the evidence.

DOE EX DEM KINNEAR *versus* WISWELL.

A peremptory undertaking will not be enlarged, merely on the ground that when the cause was called on at the Circuit, a witness who resided in the Town was not in Court, and that therefore the record was withdrawn.

The *Solicitor General* moved to enlarge a peremptory undertaking of the Plaintiff to proceed to trial in this cause, at the last Saint John Circuit, on an affidavit which stated that the cause was entered for trial, and the Plaintiff's witnesses who were resident at Saint John, were not in attendance when the cause was expected to come on—the Attorney sent for them, but two of them could not be found; expecting them to come into Court, the Plaintiff's Counsel moved for trial,

and withdrew the record after eight of the Jury were sworn, solely from the absence of the witnesses.

N. Parker, for Defendant, urged—that the absence of witnesses under such circumstances, might be a sufficient cause to discharge a *first* rule for Judgment as in case of a non-suit, but was wholly insufficient to enlarge a peremptory undertaking.

CHIPMAN, C. J.—Absent.

BOTSFORD, J.—Very little ground is stated, no reason appears for the absence of the witnesses. The undertaking ought not to be enlarged.

CARTER, J.—It appears the witnesses were in St. John, and the only ground of the application is, that they were not in Court when the cause was called on.

PARKER, J.—This matter is important as a point of practice. Parties and their witnesses must learn the necessity of a punctual and regular attendance. No sufficient reason has been given for the non attendance of the witnesses in the present case, to justify the Court in opening the peremptory undertaking. The rule for a non-suit must be made absolute.

MOULTON *versus* DIBBLEE.

Service on a Clerk is insufficient, unless at the Office or Dwelling House of the Attorney.

Robinson, moved to make absolute a rule *nisi*, for Judgment, as in case of a nonsuit, on an affidavit of the service of the rule on one Hammond, the clerk and agent of Needham, the Plaintiff's Attorney.

PER CURIAM.—The rule if served on a clerk, should have been served at the office or at the dwelling house of the Attorney, which is not stated in the affidavit to have been done.

Rule refused.

EXPARTE. THE ST. JOHN WATER COMPANY.

***An application for a warrant to assess the amount to be paid for certain Lands required by the Company—was refused, it not being shewn,* that the Corporation deemed the Lands absolutely necessary.**

N. Parker, moved for a warrant to be issued to the Sheriff of Saint John, to summon a Jury to assess and ascertain the

sum, or annual rent to be paid for certain Lands of the Hon. *Ward Chipman*, upon and through which the Company were desirous of making reservoirs, and carrying pipes and conductors.

The application was founded upon an affidavit, stating that a Committee of the Company had applied to the owner of the Land, who had declined to sell the Land or to name an Arbitrator to determine the value. The Company were incorporated by Act of Assembly, 2 W. 4, c. 26, the 15th sec. of which act authorizes the Company "to draw water from, erect reser- "voirs on, and to carry pipes or conductors through *(when* "*such shall be deemed absolutely necessary for the conveyance of* "*water to the City by the said Corporation)* the private pro- "perty of individuals, whose lands may lie at the source or in "the line, the said Corporation shall think it expedient to con- "vey the water from, or through, &c." and then provides that the Corporation shall first pay for the use of the same, or any damage to the owner, which, in case of disagreement, shall be determined by arbitration; and if, the owner shall decline making such agreement or appointing an arbitrator, "then the "said Corporation may make application to the Supreme "Court, (stating the grounds of such application,) and such "Court is empowered to issue a writ or warrant, &c."

CARTER, J.—How does it appear to be absolutely necessary to carry the water through the Lands required? The Committee do not themselves swear that the Lands are necessary—they should report to the Corporation. The Corporation must adopt their act, and determine the necessity, and such determination must be made to appear by the Oath of the Committee, or Directors, or other persons. I do not express this as a Judicial opinion, but throw it out as the least terms the act will admit of—it is sufficient in refusing this application, that it is not made to appear *that the Corporation deem the Lands absolutely necessary.*

PARKER, J.—I am also of opinion that sufficient grounds have not been laid, for the interference of the Court. It does not appear that the Corporation have, as yet, decided on the necessity of obtaining the Land, which must at all events be done; but I am rather under the impression that the Legislature, in directing the grounds of the application to be stated, intended that the Court should also be satisfied of the necessity, before exercising its authority. I mention this now, as the Corporation may consider it expedient to apply to the Legislature for an alteration in the act, if the powers already granted are not deemed sufficient. The present motion certainly cannot be sustained.

NOTE.—The CHIEF JUSTICE, and BOTSFORD, J. did not sit during this application.

HATTON *versus* FLAHERTY.

A Judgment signed on the 16th October, the Rule Nisi *having been entered on the 13th—was held irregular, the four day Rule not having expired.*

This cause stood for trial at the St. John Circuit, in June 1835, when by the consent of the Attornies, a Verdict for £520 15s. was entered for the Plaintiff, "subject to be reduced by the award of Angus M'Kenzie, — —, — —, or any two of them."

Angus M'Kenzie, the only arbitrator named, was nominated by the Plaintiff; the Defendant was to name another, and the two were to choose a third, "their award to be final and binding upon the parties, if made and ready to be delivered on or before the first day October, and the said verdict, or such reduced amount as the first arbitrators might award to be entered on the Postea and Judgment thereon to be entered up with costs to be taxed of the then next Michaelmas or any subsequent Term."

The Defendant's Attorney was under an impression that the first day of Michaelmas Term was the time appointed for making the award; on the 8th day of October he applied to the Plaintiff's Attorney, and offered to appoint an Arbitrator and proceed; the Plaintiff's Attorney declined doing so; and on the 1st day of Michaelmas Term, the 13th of October, entered a Rule for Judgment on the Postea, and on the 16th the Roll was brought in, and final Judgment signed for the amount of verdict and costs.

On a subsequent day in the same Term, the Solicitor General for the Defendant obtained a Rule Nisi for setting aside the Judgment upon two grounds:

1st. That the Judgment was signed before the expiration of the four day Rule.

2d. That the Plaintiff was not entitled to enter up Judgment for the amount of the verdict without a special application to the Court.

Cause was now shewn by F. A. Kinnear for the Plaintiff; the Defendant would not within the time limited appoint an Arbitrator, and therefore the Plaintiff was entitled to act upon the verdict which had been entered for his protection and benefit. Evans vs. Davies, 3 Dowl, P. C. 786; Doe d. Fisher vs. Saunders, 3 B. and Ad. 783; Hall vs. Phillips; 9 Bingham, 89.

PER CURIAM.

The argument of the learned Counsel for the Plaintiff, might have been a good ground of application to the Court to call

upon the Defendant to shew cause why the verdict should not stand; but without agitating the second point the Rule must be made absolute on the first; the Judgment is irregular, having been signed too soon. The Court strongly recommend a new arbitration. The Plaintiff has a right to pursue his own course, but he should be exceedingly well advised before he ventures again to enter up his Judgment, without an application to the Court.

Rule absolute.

F. A. Kinnear for the Plaintiff.

The *Solicitor General* and *L. Hazen* for the Defendant.

HILARY TERM 6TH WILLIAM IV.

ANNO DOMINI 1836.

GENERAL RULES.

1st. It is ordered, That in future the Clerk of the Pleas do keep a paper to be called *the Motion Paper*, in which shall be entered all Motions of which notice may have been given; such entries to be made on or before the first day of each Term, and to stand in the said Paper in the order in which they may be made; and the matters contained in such Motion Paper shall come on to be heard on the second day of the Term, before the Special paper is gone into.

2d. It is further ordered, That if notice of any motion, and a copy of the affidavit or affidavits on which it is intended to be grounded, shall be served upon the opposite party, his attorney or agent as the case may be, fourteen days before the Term at which the motion is intended to be made; a rule absolute may be made in the first instance, if the Court shall see fit; and in all such cases the cause shall be entered on the Motion paper.

3d. It is further enacted that no Motion shall be made for Judgment as in case of a nonsuit, pursuant to the Statute 14 G. 2 C. 17, without notice having been first given thereof to the Plaintiff, his Attorney or Agent as the case may be, together with a Copy of the Affidavit on which the same is grounded at least fourteen days before the Term at which such motion is intended to be made, and without entering the same on the Motion paper.

4th. It is further ordered, That on motion made in open Court pursuant to the said entry, and on due proof of the service of notice, and copy of Affidavit as directed by the preceding Rule, the Defendant shall be entitled to a Rule absolute for Judgment as in case of a nonsuit, unless the Court on just cause and reasonable terms shall allow a further time for the trial of the issue, or unless the Court should think fit to enlarge the time for showing cause to the next term.

5th. It is further ordered, That no Judgment of *non pros* shall be signed for want of a Declaration Replication or other subsequent pleading until ten days next after a demand thereof shall have been made in writing upon the Plaintiff, his Attorney or Agent as the case may be.

6th. It is further ordered, That demurrer Books be delivered to the Judges on or before the first day of the term, at which the Demurrer is to be argued; the Books for the Chief Justice and Senior Puisne Judge to be prepared and delivered by the Plaintiff's Attorney, and the Books for the two Junior Judges by the Defendant's Attorney; and that the same Rule do also apply to other cases in which Paper Books are required by the practice of the Court to be delivered to the Judges.

7th. It is further ordered, That a copy of the bill of particulars of the Plaintiff's demand, and also of the Defendants set off (if any) shall be filed by the Plaintiff's Attorney with every Record of Nisi Prius at the time of entering the same.

8th. It is further ordered, That it shall not be necessary to issue more than one summons for attendance before a Judge upon the same matter; and the party taking out such summons shall, if the Judge see fit, be entitled to an order on the return of the summons, unless cause is shewn to the contrary.

WARD CHIPMAN,
W. BOTSFORD,
J. CARTER,
R. PARKER.

TRINITY TERM,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

KERR VERSUS CONNELL.

A License to cut a certain quantity of Timber from Lands described in the Licence and to remove the same, does not convey an interest in Lands within the Statute of Frauds, or give any property in standing Trees.

Such License gives the Licensee no right to Timber cut within the described limits, by a stranger, without authority;

Timber so cut remains the property of the Owner of the Land: against every other person, the possession of the Timber and the labour bestowed upon it gives the Maker, although a wrong doer, the right to it.

If two persons expend labour in cutting and hauling Timber under an agreement that such Timber is to be got on the halves, *they are Tenants in common—and neither can convey as against the other more than his undivided share.*

THIS was an action of Trover, to recover damages for a quantity of Timber claimed by the Plaintiff, and taken and converted by the Defendant. At the trial before PARKER, J. at the Carleton Circuit in September, 1835, it appeared in evidence on the part of the Plaintiff, that a Licence issued in December, 1834, from the Crown, to one William J. Bedell, "to cut two hundred tons of white pine timber from Crown Lands therein described, and to remove the same." This licence was procured by the Merchant Bedell, for the benefit of the Plaintiff, who was a Lumberer. The Defendant had a Licence at the

same period, to cut Birch Timber on the same land, and in like manner had placed it in the hands of the Lumberer for whom he had procured it, one Walton. Walton employed a person named Price, to hew Birch Timber for him (Walton,) under Connell's Licence; and it was agreed that if Price should find any Pine Timber, he should make and hew it, and prepare the roads for hauling, that Walton should haul it, and that it should be shared between them, when hauled to the brow. Price, under this agreement, commenced making birch timber, and also manufactured sixteen sticks of Pine Timber, which were hauled part of the way to the brow, by Walton. At this time the Plaintiff forbade Price to make any more Pine Timber, and at the same time paid him for his labour in making the sixteen sticks, and bought from him his right thereto, and hauled the said sixteen sticks to the brow; they were rafted in the Spring by the Plaintiff, and carried down the River to a place where the Plaintiff had other Timber. In the night the fastening of the timber was cut, and a part of the timber carried away—eight sticks of it, which were the subject matter of this action, were afterwards found in the possession of the Defendant, who stated that he had purchased them from Walton, and refused to deliver them to the Plaintiff.

A nonsuit was moved for by *Berton* for the Defendant, on the following grounds; viz.

That the Licence to Bedell could not be transferred by parol, inasmuch as an interest in lands was vested in the Licensee, within the Statute of Frauds; and being an instrument under seal; it could not be assigned except in a similar manner.

That the Licensee derived by the Licence only a right to cut Trees to be made into timber, and had no right to timber already cut and made by others.

That Price was only a servant of Walton, to be paid in kind for his work and labour, and had no right in the timber to sell, or if he had, his right was only as a tenant in common to one half the timber.

The learned Judge reserved the points, and gave leave to the Defendant to move for a nonsuit. The Plaintiff obtained a verdict for the value of the Timber.

Berton, for the Defendant, moved, in last Michaelmas Term, and obtained a Rule *nisi*, to set aside the verdict and enter a nonsuit. In support of the first point, he urged that the Licence from the Crown, which gave metes and bounds to the land comprehended therein, vested in the Licensee an interest in lands within the Statute of Frauds, and therefore, if assignable at all, was not so by parol, 6 E. 502 Crosby v. Wadsworth—2 Bos and Puller, 452, Waddington v. Bristow—3

Taun. 38, Emmerson v. Heelis. The Court in granting the rule, excluded this point, and determined that the Licence vested no interest in the lands within the Statute of Frauds.

Cause was shown by the *Solicitor General* in Hilary Term.

The licence under which the Plaintiff claimed the timber, was obtained by Bedell expressly for the benefit of Kerr, as was shown by his declarations in evidence. That fact was further substantiated by the document being in the possession of the Plaintiff; the manner of obtaining it agreed with the common custom of the country, and even, if in the opinion of the Court, the license should be considered not transferable, yet Bedell must be taken to have been only an agent, acting for the Plaintiff his principal, 1 Camp. 337, Duke of Norfolk *v.* Worthy: as to the right in the Licensee to Timber already cut, Walton and the Defendant had no right to any but Birch Timber; if, then, Price, even under his agreement with Walton cut Pine Timber, no right thereto was vested in Walton, and it having been transferred by the maker to the Plaintiff, his right to it could only be questioned by the Crown, and even as between the Plaintiff and the Crown, he having paid stumpage for a certain quantity of timber, of which this was to be reckoned a part, and having paid for the manufacture thereof, was, even as against the Crown, the owner of the Timber.

Berton, in support of the Rule. The license issued to Bedell and nothing appeared therein to shew that he acted for the Plaintiff, the stumpage money was paid by him—the license was to him, and to him alone—and no other person could claim in his own right under that license. The Plaintiff rested his claim to the Timber, on his right under Bedell's license; if then the license gave him no right, his claim to the Timber was unsupported. And again, even supposing the Timber to have been got under Bedell's license, it would be fair to presume, that Kerr was but the servant of Bedell, and if so, any action should have been by Bedell, and not by the Plaintiff.

In this term the Court delivered their opinions.

CHIPMAN, C. J.

This was an action of Trover for a quantity of *White Pine* Timber in which a Verdict was given for the Plaintiff, with leave reserved at the trial for the Defendant to move to enter a Nonsuit. The main question discussed on this motion has been, as to the Plaintiff's property in the Timber in question. The facts as deduced from the evidence given and the finding of the Jury, may be stated as follows:—

On the 18th December, 1834, the following License was issued from the Crown Lands Office, to W. J. Bedell.

"Application No. 1207, License No. 845 for 200 T. Tonnage.
"£12 15s. paid

(L. S.) "By His Excellency Major General Sir Archibald Campbell, Baronet, G. C. B. Lieu-
ARCHIBALD CAMPBELL. "tenant-Governor and Commander in Chief
"of the Province of New Brunswick,
" &c. &c. &c.

"Upon application made to me by William J. Bedell,
"of the Parish of Fredericton, in the County of York,
"in the Province of New-Brunswick, and recommended
"by the Commissioner of Crown Lands and Forests,
"who has hereto set his hand and seal. I do hereby
Mark. "grant License unto him the said Wm. J. Bedell, *to cut*,
K "subject to the Regulations heretofore published, and
"under the terms and conditions in those Regulations
"contained, *Two Hundred Tons White Pine Timber*,
"from ungranted and unapplied for Crown Land, situate
"on the East side the River Saint John, to be bounded
"South by the line run by Deputy Garden, East by the
"Monquat, North by Smith's Brook, and West by the
"Granted Land, *and to remove the same.* The said
"William J. Bedell, is not to cut any Timber without
"the limits before described, nor any more than the
"quantity herein specified, on pain of having the whole
"seized. This License to continue in force (unless le-
"gally suspended) until the first day of May next ensu-
"ing the date hereof, and no longer, after which time no
"Timber is to be cut or hauled out under pretence
"thereof."

(Signed)
(L. S.) THOMAS BAILLIE,
Commissioner of Crown Lands and Forests.

"Given under my Hand and Seal at Fredericton, the
"18th day of December, in the fifth Year of the Reign
"of His Majesty King William the Fourth, and in the
"Year of our Lord One Thousand eight Hundred and
"Thirty Four.

"By His Excellency's Command,
(Signed) WILLIAM. F. ODELL.

"Deputy Surveyor MACLAUCHLAN."

This License was placed in the hands of the Plaintiff by the Licensee Bedell, to get the Timber under it, and if the License could be assigned by the Licensee to another person, and be transferred by words and delivery only, it was not contended that it was not sufficiently transferred by Bedell to the Plaintiff: It appeared indeed that the Licence was procured by Bedell for the benefit of the Plaintiff, according to what

was stated to be a common custom, Bedell being a Merchant dealing in timber and Kerr the Plaintiff being a Lumberer. The Defendant Connell, had a licence to cut *Birch* Timber on the Land described in the above License to Bedell, and this License was in like manner put by the Defendant, who is also a Merchant, into the hands of one Walton, a Lumberer, to get the timber under it. One Price was employed by Walton to hew the *Birch* Timber under the latter License, and it was agreed between Price and Walton, that if Price found any *Pine* Timber upon the ground, they Price and Walton should get it to the halves, on the Brow. Price was to cut, hew, and swamp it, and Walton to haul it out to the Brow. The *Pine* Timber in question in this suit was cut and made by Price, and hauled part of the way and yarded by Walton under this agreement. In this state of affairs the Plaintiff interfered and claimed the timber under his Licence, i. e. the above License to Bedell, forbidding any more *Pine* Timber being cut by Price, and bought from *Price* all *his* right to this timber, paying him for the labor he had expended upon it.—The Plaintiff then hauled the timber to the bank or brow from the place where Walton had yarded it. There were in all sixteen sticks of this Pine Timber, and the Defendant Connell, under a transfer from Walton took possession of eight of these sticks—this action was brought for these eight sticks. The Plaintiff founded his right of property in this timber upon the above License to Bedell—and it is advisable in the first place to inquire into the nature of the right which the License conferred upon the Licensee named in it, supposing him to have been the person who actually exercised the right which the Licence gave: for if it should appear, that the Licence vested no right of property to the timber in question in this cause in the person to whom it was expressly granted, it will be unnecessary for the Court in giving judgment to go into the questions which have been mooted, as to the power of the Licensee to assign the License, no such power being expressed in the License; or whether the Plaintiff might, under the circumstances, be considered as the Principal in the License, and Bedell only as the Agent in procuring it.

The nature of a License is explained by L. C. J. Vaughan, in the case of Thomas vs. Sorrell—Vaugh. 351, in the following manner:—

"A Dispensation or License properly passes no interest, nor "alters or transfers property in any thing, but only makes an "action lawful, which without it had been unlawful. As a "Licence to go beyond the Seas, to hunt in a man's Park, to "come into his House, are only actions, which, without Li-

" cense had been unlawful. But a License to hunt in a man's " Park and *to carry away the Deer killed to his own use*, to " cut down a Tree in a man's ground and *to carry it away the* " *next day after to his own use*, are Licenses as to the acts of " hunting and cutting down the Tree, but as to *the carrying* " *away of the Deer killed and Tree cut down, they are Grants.* " So to licence a man to eat my meat, or to fire the wood in " my chimney to warm him by, as to the actions of eating, " firing my wood, and warming him, they are Licenses; but " it is consequent necessary to those actions that my proper- " ty be destroyed in the meat eaten, and in the wood burnt, " so as in some cases *by consequent* and not directly *and as its* " *effect, a Dispensation or License may destroy and alter pro-* " *perty.*"

A reference to the terms of the Licence in the present instance will best explain its meaning. It is "*to cut*" and "*to remove*," subject to the conditions of the Licence, "two hundred Tons White Pine Timber" from ungranted and unapplied for Crown Land, situate as described in the Licence. A License in these terms clearly amounts to *a Grant* of the Timber which may be *cut and removed according to the terms of the License*, but of *no more*. It conveys no title whatever to any Timber which is *not cut* and *removed* by virtue of the License. The case of Basset vs. Maynard—Cro. Eliz. 819, in which a question arose as to the sale of a quantity of wood to be taken at the Vendee's election, is so apposite to the present case, and so fully supports the position I have just stated, that I will cite it at large.

" Action *sur trover* and conversion of certain loads of wood. " Upon a special Verdict, the case was,—Sir Thomas Palmer " was seized of a great wood, and bargained and sold to one " Cornford *and his assigns* as many trees as would make 600 " cords of wood, to be taken by the assignment of Sir Thomas " Palmer. Cornford assigns over his interest to the Plaintiff. " Afterwards Sir Thomas Palmer granted to the Defendant so " much of his wood as would make 4000 cords of wood, to " be taken at the Defendant's election. The Plaintiff after- " wards by the assignment of Sir Thomas Palmer, cut down " the trees in question, to make 600 cords; and the Defendant " *claiming them by virtue of his Grant, took them.* It was " found that there was sufficient wood left for the Defendant " to make his 4000 cords, et si, &c. Upon this Verdict, it " was moved, that here was not sufficient title found for the " Plaintiff. For first, it is not found that the bargain and sale " was for any sum of money, nor upon any consideration. Sed " non allocatur. For it is intended to be so, being found by

" the Verdict. But if it had not been so found, it might per-
" adventure have been otherwise, as Dyer, 91, is.

" Secondly, it was alleged, that this Grant to the Plaintiff
" is void, for until the assignment made by Sir Thomas
" Palmer, no interest vested in Coruford himself, so as he
" could not make any Grant thereof, over. But all the Court
" held the Grant to be good; for being made to him *and his*
" *assigns*, he may make an assignee, which shall enure as a
" nomination to one, who is to have by the appointment of
" Sir Thomas Palmer; and it may well vest in him, as the
" interest also. And here he hath no interest before the as-
" signment made by Sir Thomas Palmer; insomuch as if Sir
" Thomas Palmer will not assign it in convenient time, he
" himself might take them; and therefore he may assign this
" interest, as 44 Edw. III. pl. 43 is. But admitting the Grant
" to the Plaintiff had been void, yet Popham said that the Ac-
" tion was maintainable; *beeause by the cutting down of them,*
" *he had possession and a good title against the Defendant and*
" *every stranger; and being cut down it was not lawful for the*
" *Defendant to take them:* for if one sells 1000 cords of
" wood, to be taken at the Vendee's election, and afterwards
" the Grantor or a stranger cuts down some of the wood, *the*
" *Vendee cannot take that which is cut down, but he ought to*
" *make his Grant good, out of that which is growing.* As if
" Estovers were granted unto him, to be taken in a great
" wood, and the Owner of the wood cuts down some of the
" wood, the Grantee cannot take that which is cut down, but
" he must take his Estover out of the residue. And if all be
" cut down, he hath not any remedy, but an action upon the
" case. So here, *although the Plaintiff hath not a good title,*
" *yet his having possession of them, being cut down, sufficeth.*
" *Quod Gawdy et Clinch concesserunt*—wherefore it was ad-
" judged for the Plaintiff, 5 Co. 24 v."

In the present case the Timber was not cut under Bedell's License, but by persons altogether unconnected with it, and so adverse to it, that they were forbidden by the Plaintiff to proceed. If the argument adduced on the part of the Plaintiff, that the Licensee under Bedell's Licence had a right to avail himself of Price's acts in cutting Pine Timber on the Land included within the Licence, by paying him for his labor in so doing, were acceded to, it would make the Licence to convey a general authority from the Crown to compound for any trespass committed in cutting White Pine Timber on the Land described in it—an inference, which requires only to be stated, to shew its utter inadmissibility. I am clearly of opinion that not a shadow of title can be derived under Be-

dell's License to the Timber cut by Price, which is the subject of this action. In whom then was the property in this timber? I answer that the property undoubtedly remained in the Crown, the Timber having been cut on Crown Lands without authority. But it is for the Crown to enforce its own rights. Against every person but the King, the possession of the Timber and their labor bestowed upon it, gave to Price and Walton the right to it, and the nature of their relative rights is to be determined by their own agreement. Each of them had expended labour on the timber under the agreement, and by that agreement, *as the timber was to be got to the halves*, they were Tenants in Common, each of one half; and neither of them could convey as against the other, more than an undivided moiety. The sale from Price to the Plaintiff therefore conveyed to him Price's interest only, i. e. an undivided moiety, and the Plaintiff became a Tenant in Common with Walton or Walton's assigns, when Walton conveyed his share. Walton's interest in the Timber was transferred to the Defendant, who thus became a Tenant in Common with the Plaintiff—and as it is the general rule, to which this case does not afford an exception, that a Tenant in Common cannot maintain trover against his companion, I am of opinion that upon this ground, the rule for entering a nonsuit must be made absolute.

Botsford J.—Concurred.

Carter, J.—To maintain this, which is an action of trover, the Plaintiff must shew some right of property in the subject of the action; this he has attempted to do in two ways:—first, he claims a right to the Timber in question under a License from the Crown; the Licence which he offers in evidence in support of this right appears to be a Licence from the Crown to W. J. Bedell, to cut (subject to certain Regulations which do not appear in evidence) Two Hundred Tons of White Pine Timber, from Crown Lands described therein, and to remove the same:—now it appears most clearly from the evidence that the White Pine Timber, which is the subject of this action, was not cut under the License either by the Plaintiff, or by Bedell; but was cut by a person named Price, without any authority or right whatever. The case of Bassett vs. Maynard, already cited from Cro. Eliz. 819, is a direct authority, to shew that this License could give neither the Plaintiff, nor Bedell any right to Timber so cut, and so far as this case is concerned, it will be sufficient, on this ground alone, to decide that the Plaintiff has failed in establishing any title to the Timber in question under the License.

On the second ground on which the Plaintiff rests his title, I think he has also failed: claiming this Timber by a transfer

from Price, he cannot have a better title to it than Price himself had. As far as all three parties are concerned:—from the agreement between Price and Walton, they would become joint owners of the White Pine Timber cut by Price—then Walton transfers his share to the Defendant, and Price his share to the Plaintiff—the Plaintiff and Defendant would thus become Joint Owners of the Timber, and therefore an action of trover would not lie by one against the other.

For these reasons, I think the rule for a nonsuit must be made absolute.

PARKER, J.—It is impossible for the Plaintiff to establish his right to recover in this action, by virtue of the agreement made with Price; unless he can make out a title to the Timber in question, from the Crown under the License given to Bedell. At the time of such agreement, the Timber (setting aside the Crown rights) was either in the sole possession of Walton or in the joint possession of Price and Walton, under a previous agreement made between them, for the purpose of being hauled from the woods to the brow of the river upon shares, an agreement which constituted between them the relationship of Tenants in Common;—it is clear then that Price at the time of his delivering the Timber to the Plaintiff, had neither the right of property nor exclusive possession; and as the Defendant stands in Walton's shoes, if the Plaintiff cannot shew a title independently of Price's act, he must fail.

One very material question which was suggested at the argument by His Honor the Chief Justice, whether the License was assignable at all, was not mooted at the trial, but the two which have been argued, namely, whether the License from the Crown to cut so many tons of pine Timber, would give the Licensee a right to take pine Timber cut by a stranger; and whether the interest in the License could pass by a parol assignment were urged by the learned Counsel for the Defendant; and as it was admitted on all hands that they were most important in a general point of view, as they affected the great staple trade of the country, I was glad to reserve them without giving an opinion, and the case went to the Jury on the questions of fact as to the identity of the *Place* and the *Timber*, which they found, and very properly so, in favor of the Plaintiff; for there could be little or no doubt, that the Timber which Connell the Defendant avowedly got from Walton, was part of the same which had been cut by Price within the limits of the Berth described in Bedell's License.

I should remark also that I stated to the Jury, that allowing a parol assignment to be valid, I thought there was quite sufficient evidence to presume an assignment in this case; and this seemed rather conceded by the Defendant's Counsel; but

then, part of the evidence, namely, Bedell's declarations, were distinctly objected to, and received by me also subject to the opinion of the Court; and the entire question is, I think, fairly open for discussion if the case required it. As to the first point reserved; on a full consideration and review of the authorities, I entirely concur with His Honor and my Brothers, that the Licence gave no property in the standing Trees, and would not enure as a grant until the Trees were selected and cut by the Licensee or under his authority; that the property in the Pine Timber so cut by Price, was, and still is, for aught that appeared in evidence, vested in the Crown, and consequently neither the Plaintiff nor Bedell, could maintain trover for it, against the person who has a right to the possession, as against Price and those claiming under him.

The case of Thomas vs. Sorrell, from Vaughan, 351, (which has been already cited) puts in very clear terms the nature of the rights which the parties derive under these Licenses. There is a manifest distinction in the form of the Instrument between a License to cut Trees within certain prescribed limits to make a specified quantity of Timber, and a bargain and sale or grant of particular Trees, or all the Trees, on a particular spot of ground—on this point the case of Dewclas & al vs. Kendall & al, in Yelverton, 188, is well worth noting. It would appear indeed, by the cases that a *demise* of *all* the trees, though with liberty to cut, would not transfer the property until cut—there must be an actual sale or grant—see 14 Vin. Abr. 83 & 84. Stukely vs. Butler, Hob. 174, 6—also Cheltham vs. Williamson, 4 East. 469.—Still vs. Butler, Cro. Eliz. 434.—Russell vs. Maynard, Cro. Eliz. 819—Raebban vs. Jessup, 3 Wils. 333 n. Woodson vs. Newton, Str. 777, and Smith vs. Surnam 9 B. & C. 573.

As to the several other objections which have been raised, the view which we have taken of the principal question, renders it unnecessary to give an opinion; but I beg my present silence may not, as the case now presents itself, be considered in consequence of any thing which fell from me at Nisi Prius, as agreeing to the position that the present Plaintiff was clothed with the rights which Bedell derived from the Crown License. It is well also to observe, that there was nothing in this case to make it an exception to the general rule respecting Tenants in Common, and that any presumption of severance of the tenancy would make against the Plaintiff, as, for anything that appeared, he retained possession of a moiety of the Timber, and his claim went to the whole.

Rule Absolute.

The *Solicitor General* for Plaintiff.

S. Wetmore and *Berton* for Defendant.

DOE EX DEM WILT *versus* JARDINE.

A Deed whereby the Releasor released to the Releasee, his Heirs and Assigns, all his right, title, interest and claim to certain Lands, to have and to hold the same, to him, his Heirs and Assigns, forever; the same having been duly executed, proved and registered, pursuant to the Act of Assembly, 26 Geo. 3, c. 3, is a good Conveyance of Lands, within the meaning of the 10th section of the said Act.

THIS action of Ejectment was tried before CARTER, J. at the Kent Circuit in August, 1835. The Lessor of the Plaintiff established a *prima facie* case, under a Grant from the Crown to him of the land in question, bearing date 17th June, 1830. The following deed was given in evidence for the Defendant, and formed part of his title, viz:—

"Know all Men by these Presents, that I, John Wilt, of Liverpool, "in the County of Kent, Yeoman, for and in consideration of the sum "of two hundred pounds of lawful money of New-Brunswick, to me "in hand paid by Robert Jardine and John Jardine, of the same place, "Merchants, at or before the sealing and delivery of these presnts, the "receipt whereof is hereby acknowledged, *have remised, released and "quit claimed*, and do by these presents *remise, release and quit claim* "unto the said Robert Jardine and John Jardine, *their Heirs and As-"signs forever, all my right, title, interest, and property claim in and "to the following demised premises, viz. a certain Lot of Land applied "for by me to Government*, situated on the South side of the Richi-"bucto River in the County aforesaid, in the Rapids of the main river "aforesaid, with all and singular the appurtenances thereunto belong-"ing. *To have and to hold the same premises, unto the said Robert "Jardine and John Jardine, their Heirs and Assigns, forever.* In Wit-"ness whereof, I have hereunto set my hand and seal, this fifteenth "day of October, in the year of our Lord one thousand eight hundred "and thirty. (Signed) "JOHN WILT. [L. S.]

"Signed, sealed and delivered
"in presence of
(Signed) "PETER STUBS."

"KENT, } Peter Stubs, of Liverpool, in the County aforesaid, Esquire,
to-wit. } "maketh oath and saith, that he, this Deponent, was pre-"sent, and did see the within named John Wilt sign, seal and execute "the foregoing Deed freely and voluntarily, for the use and purposes "therein mentioned, and that the name John Wilt, set and subscribed "as the Grantor aforesaid, is of the proper handwriting of the said "John Wilt, and that the name Peter Stubs, set and subscribed as the "subscribing witness thereto, is of the proper handwriting of this De-"ponent. (Signed) "PETER STUBS."

"Sworn to at Liverpool aforesaid,
"in the County aforesaid, this
"27th day of October, 1830,
"Before
(Signed) "GEO. PAGAN, Reg. Deeds, &c."

"Registered in Book B. pages 442 and 443, this twenty-seventh day "of October, 1830, and is number 208 in said Book.
(Signed) "GEO. PAGAN, County Reg."

J. A. Street, for the Plaintiff, contended, that the deed being merely a release, required some previous right or interest in the Releasee in the Land released, upon which the deed might operate, and no such right or interest having been shewn, the Deed was inoperative.

The learned Judge ruled, that the Deed was sufficient to pass the fee simple in the Land mentioned in it, and under his direction in this respect, a Verdict was found for the Defendant.

In last Michaelmas Term a rule Nisi, to set aside the Verdict and grant a new Trial, was obtained.

J. A. Street, in moving for the rule, took the following points:

That no Deed would operate as a Conveyance of Land in this Province except such as would operate by the Common Law, or under the Statute of Uses and Inrollments in England.

That the deed from John Wilt to Robert and John Jardine, under which the Defendant claimed title, would not operate either as a Feoffment at Common Law, or as a Bargain and Sale under the Statute of Uses.

4 Cruise Dig. 48, 49, 107, 115.—1 Cruise Dig. 354.—1 Shep. Touchst. 165, 222.—2d do. 113.

Cause was shewn in Hilary Term.

E. B. Chandler for Defendant.

The Deed was not offered as a Release at Common Law. It is a good Feoffment, and, having been recorded under the Act of Assembly, has all the effect of a Feoffment in England, with Livery of Seisin.

To constitute a Feoffment at Common Law, or by Statute, no precise words are necessary.

By the Common Law, a Grantor might go upon land, and express and declare the estate intended to be conveyed, and under the Statute, it is only necessary that the intention of the parties should be expressed in writing. 4 Bl. Com. 310, 311. 4 Com. Dig. 285. The word give, may be sufficient to constitute a Feoffment. 2 Bac. Abr. 602. The Registry under the Act of Assembly is in place and dispenses with the necessity of Livery and Seisin. The 10th section of 26 Geo. 3, c. 3, provides, that all Bargains and Sales of Lands, &c. and all Grants and Conveyances whatever, which shall be entered and registered at full length, as required by the same Act, shall be good, effectual and available, to all intents and purposes, for the passing and transferring such Lands, &c. and the estate and possession thereof, without Livery of Seisin, or other act, deed or ceremony whatsoever.

Then the question is, whether this Deed is a good Charter of Feoffment at Common Law. The material circumstance

necessary in such an instrument is, the declaration of the quantity and duration of the estate.

Again—The Deed operates as a Bargain and Sale under the Statute of Uses, as connected with the Act of Assembly.

No precise form of words is necessary to constitute a Bargain and Sale. 1 Bac. Abr. 686. Tit. Bargain and Sale. Any words sufficient at Common Law to raise a Use, will enure as a Bargain and Sale. Then what words will raise a Use? any, which shew the intention of the parties. 7 Com. Dig. 572-3 Tit. Uses. D. 1.

3dly. The Deed may, with the aid of the Provincial Statute, operate as a Release—the Act supplying the place of a Lease. Language cannot be more conclusive than are the words of the Act.—[CARTER, J. Is not a previous Estate necessary to support a Release?] It has been held in the West Indies—in Antigua, Saint Vincent and Jamaica—under their Registry Acts, that a recorded Conveyance requires not Livery of Seisin. 2 Bythewood, 222.—3 Bythew. 165.—7 Bythew. 149.

The *Solicitor General* followed on the same side.

The situation of these parties is of a peculiar nature. The party who made this Deed is now attempting to avoid its effect, and turn out of the possession of the Land the persons to whom it was given: it is an attempt on the part of the Lessor of the Plaintiff to defeat his own Deed, made for a valuable consideration. Unless, then, a very clear case in point of law is made out, the Court will not assist him. The question is not within any of the authorities cited on the other side.

By the Common Law, an entry on the Land and actual Livery of Seisin, were necessary, but these are not necessary here. The Lease for a year was necessary to do away with Livery of Seisin, all which is wholly unnecessary by the provisions of the Act of Assembly. The Deed shall enure according to the uses, intents and purposes therein expressed, is the language of the Province Law: what then, are the uses, intents and purposes of this Deed? There can be no doubt on this point; the Habendum expresses that the Grantees shall hold to them, their Heirs and Assigns, forever. The intention of the parties being clear, the Deed, by the Act of Assembly, must take effect.

The *Solicitor General* was stopped by the Court, who directed the attention of the Counsel on the other side to the Act of Assembly on which they considered the question must turn.

J. A. Street in support of the Rule.

The question then is, whether this Deed is a good Conveyance under the Act of Assembly, or, in other words, is it such

a Deed as, under the terms of the Common Law, restrained by the Statute of Frauds, would create a Feoffment. The 10th section of the Act enacts, that all Deeds duly recorded, &c. shall be sufficient without Livery of Seisin; and comparing this with the Statute of Uses and Inrollments, it is clear that our Act is founded upon those Statutes, the question, therefore, is resolved wholly into the point above stated. A Deed which will amount to a Bargain and Sale, is a good Feoffment; but here there are neither such words as will raise a Use or a Covenant to stand seized. If it contained the words grant, bargain and sell, or any equipollent words, it would be sufficient under the Act of Assembly. A Release may enure by way of *mitter le droit*—enlargement, or extinguishment; in either of which cases, it is founded on the Privity of Estate between the parties; here the parties are strangers, without any Privity of Estate or interest in the Release, upon which to found this Release; therefore, it cannot operate as a Release; and being without words of Conveyance, or such as will raise a Use or Covenant to stand seized, it cannot operate as a Feoffment, and therefore cannot be considered a good Conveyance within even the extensive meaning of the Act of Assembly.

Cur. adv. vult.

In this Term the Court delivered their opinions.

CHIPMAN, C. J.—Referred to the Deed as set forth above in the statement of the cause, and then proceeded.

The learned Judge ruled at the trial that this Deed was sufficient to pass the fee simple in the land mentioned in it, and under his direction in this respect, the Verdict was found. A rule for a new trial was obtained on the ground that this Deed was not good as a Release at Common Law, there being no antecedent interest in the land in the person to whom the Deed was made, upon which the Release might operate. It was further contended, that it could not operate as a Feoffment at Common Law, nor as a Bargain and Sale under the Statute of Uses; and much learning on all these points was brought forward on both sides, in the course of the argument. I am disposed to rest my judgment entirely on the Act of Assembly 26 Geo. III. ch. 3, s. 10, which was evidently intended to lay down a broad rule to regulate the transfer of Lands in this Province, without reference to particular forms or modes of conveyance. The terms of the Act are the most broad and general that the English language affords:

"All Bargains and Sales of any Lands, Tenements and "Hereditaments by Deed indented or Deed Poll, and all "*Grants and Conveyances whatsoever*, made by writing and "duly signed, sealed and delivered and acknowledged by the

"Grantor or Grantors, Bargainor or Bargainors in such "Grants, Sales and Conveyances, &c. &c. * * which shall "be entered and registered at full length, &c. &c. * * *shall* "*be good, effectual, and available to all intents and purposes* "*whatsoever, for the passing and transferring such Lands, Tene-* "*ments and Hereditaments, and the Estate and Possession there-* "*of, to the Bargainee and Bargainees, Grantee and Grantees* "*therein named, according to the intents, uses and purposes in such* "*Deeds and Conveyances expressed, without Livery of Seisin,* "*or any other act or deed or form or ceremony whatever.*"

"*All grants and conveyances whatsoever,*" if "made by writing" and duly "signed," "sealed" and "delivered" and "acknowledged" and "registered," shall be available "*to all intents and purposes whatsoever,*" for the passing and transferring of lands, "*according to the intents, uses and purposes in such Deeds and Conveyances expressed.*" A subsequent Act, 52 Geo. III. c. 20, makes all Conveyances duly acknowledged "*or proved*" under the provisions of any Act of Assembly, to be equally good and available. It was argued on the part of the Plaintiff, that a Conveyance to be good under this Act, must tally with some technical form of conveyance known to the Law of the Mother Country. If an inquiry into this point were necessary in every instance, it would certainly tend to frustrate the evident object of the Act which I have already suggested is to facilitate and simplify the conveying of lands. This object is pursued in this part of the Provincial Statute by declaring that every *conveyance*, (to which term I give in this place its popular and ordinary signification of an act for the transferring of lands,) made by writing and accompanied by the other requisites mentioned in the Statute, shall be effectual for the transferring the lands to which it applies, according to the intents, uses and purposes "expressed" in such Conveyance, without Livery of Seisin or any other act or ceremony whatever. An American writer of high legal reputation, Mr. Dane, in his Abridgement of American Law, (vol. 4, p. 7,) well describes the general notion of a Conveyance. "Strictly speaking," says he, "Lands, being "immoveable, never can be conveyed, transferred, handed or "delivered over from man to man, in the sense a hat, a horse, "or other moveable thing is. Still, in the eye of the law, land "passes from the Grantor to the Grantee. In fact, the Grantor "relinquishes his right and possession, consents the Grantee "shall have them, and he assumes the right and takes possession "by entering on the land as his own. This is the substance, "whatever may be the form of Conveyance."

The spirit of the Act of Assembly coincides with modern authorities, which all concur in construing Deeds in such a

manner as will best effectuate the intention of the parties, without regard to technical forms. Thus Lord Mansfield, Cowp. 599. "The rules laid down in respect of the construction of "Deeds are founded in Law, Reason and common Sense: "that they shall operate according to the intention of the "parties, if by law they may: and if they cannot operate "in one form, they shall operate in that, which by law will "effectuate the intention. But an objection is made in this "case, which, it is said, takes it out of the general rule and "the doctrine of the authorities cited: and that is, that "in the Release in question the word '*grant*' is not made use "of. *But that the intention of the parties was to pass all "the right and title of the Plaintiff in these premises, is ma-"nifest beyond a doubt.*" And Lord C. J. Willes, 2 Wils. 75, 73. "By the word *intent* is not meant the intent of the "parties to pass the land by this or that particular kind "of Deed, or by any particular mode or form of Convey-"ance, but an intent *that the Land shall pass at all events*, "one way or other." * * "Although formerly accord-"ing to some of the old cases, the mode or form of a con-"veyance was held material, yet in later times, when *the "intent appears that the Land shall pass*, it has been ruled "otherwise; and certainly it is more considerate, to make "the *intent* good in *passing the Estate*, if by any legal "means it may be done, than by considering the *manner* of "passing it, to disappoint the intent and principal thing, "which *were to pass the Lands.*" * * * "Lord Ho-"bart, (who was a very great man) in his Reports, fo. 277, "says, "I exceedingly commend the Judges that are curious "and almost subtle, *astuti*, to invent reason and means to "make Acts according to the just *intent* of the parties, "and to avoid wrong and injury which by rigid Rules "might be wrought out of the Act; and my Lord Hale, "in the case of Crossing and Scudamore, 1 Vent. 141, cites "and approves of this passage in Hobart.

By the Deed now in question, John Wilt, for the pecuniary consideration mentioned in it *remises, releases and quit claims*, unto Robert Jardine and John Jardine, *their Heirs, and Assigns for ever, all his right, title, interest and claim* to the premises described in the Deed, *to have and to hold* the same to the said Robert Jardine and John Jardine, *their Heirs, and Assigns for ever.* Is it not manifest, beyond a doubt, that the Grantor meant by this Instrument to relinquish all his right and interest in the land described in it to the Grantees: to consent that they should have the land, to pass and transfer the same to them? Is not this the intent and purpose dis-

tinctly *expressed* in the instrument? The instrument is *in writing*, it is duly *signed, sealed, delivered, proved* and *registered*, according to the provisions of the Acts of the Assembly—and shall it not be available under the same Acts of Assembly to pass and transfer the land, according to the *intent and purpose thus expressed* in it? To hold the contrary would make nugatory the Acts of Assembly, and would be a manifest perversion of justice. I think the Rule for a new trial must be discharged.

Botsford, J.—I concur fully with His Honor the Chief Justice, and am also of the opinion that the Deed in question, is a good Bargain and Sale within the Statute of Uses.

Blackstone in speaking of a Bargain and Sale of Lands as a species of Conveyance, introduced by the Statute of Uses, says, that it "is a kind of real contract, whereby the Bargainor, "for some pecuniary consideration, bargains and sells, that is, "contracts to convey the Land to the Bargainee, and becomes "by such a bargain a Trustee for, or seized to the use of the "Bargainee, and then the Statute of Uses completes the pur- "chase, or as it hath been well expressed, the bargain first "vests the use, and then the Statute vests the possession."—2 Bl. Com. 838.

All the books agree, that whatever words upon valuable consideration, would have raised an Use of any Lands at Common Law—the same would amount to a Bargain and Sale within the Statute of Uses. The legal estate in the soil was not transferred by that mode of Conveyance. No Livery of Seisin was therefore necessary. The intention of the parties was the leading principle; and any instrument declaring that intention was allowed to be binding in equity.

It is laid down by Lord Chief Justice Holt, in Jones vs. Morley, in speaking of the several ways to declare Uses. "If "there is no transmutation of the possession, as by Fine, "Feoffment or Recovery, the Declaration will be sufficient with- "out Consideration or Deed. But if there is no transmu- "tation of possession, then there must be some obligatory "Agreement or valuable Consideration. If an Agreement is, "that A for so much money paid, shall have the land, this "will raise an Use."

It was admitted by Sir William Jones, in his argument in Scudamore vs. Crossing, that the Consideration of money has been held so strong, as to carry an Estate of fee simple in an Use without words of Inheritance, and in reference to Fox's case (8 Co. 185) said that the consideration of money, there expressed, carried that case.

With respect to the construction of Deeds, the intention appears to have been the governing principle. In Wilkinson vs. Tranmore, it was said by Willes, C. J. "although formerly "according to some old cases, the mode or form of a convey- "ance was held material, yet in later times, when the intent "appears, that the Land shall pass, it has been ruled other- "wise; and certainly it is more considerate to make the intent "good, in passing the estate, if by any legal means it may be "done, than by considering the manner of passing it, to dis- "appoint the intent and principal thing, which was to pass the "Land."

It is laid down in 6 Bythewood, 441, that "the operative "words in a Bargain and Sale at Common Law, and a Bargain "and Sale under the Statute of Uses are the same, but they "are essential to neither, as any other words of Conveyance "would answer the same purpose."

In Shove vs. Pincke, 5 T. R. 129, it was said by Lord Kenyon. "It never has been held necessary that the word "grant should be used in a Grant, it being sufficient if the "intention to grant be manifest by a Deed," and by Buller, J. that the words "limit and appoint" operate as a Grant.

In the case of Goodtitle vs. Bailey, Cowp. 600. The words "renounce, remise, release and quit claim, which are the "words adapted to a Release," were held to operate as a Grant, "it being the intention of the parties to pass all the right and "title of the Plaintiff in the premises."

As to the Deed in question, the consideration being for money, and the words sufficient to shew, that it was the intention of the Bargainor to sell all his right and title in the premises, to the Bargainee, his heirs, and assigns, it would, under the authorities cited, have been sufficient at Common Law, and before the Statute of Uses, 27 H. 8, c. 10, to have passed the Use in the Land—consequently, the same is a good Conveyance of Bargain and Sale within that Act.

CARTER, J.—The question in this case is, whether the Lessor of the Plaintiff divested himself of the land in dispute by a former Deed, which Deed he now seeks to set aside.

The only words of Conveyance used in this Deed are the words "*remise, release and quit claim,*" which are undoubtedly the operative words generally used in a Deed of Release—and it cannot be for one instant disputed, that as a Release, cannot create an original estate—but can only enlarge an existing estate—and in this case no such existing estate appeared in the parties to whom this Deed was made, the Deed would not operate strictly as a Release.

It is well said by Lord Mansfield in the case of Goodtitle vs. Bailey, Cowp. 597, "that Deeds shall operate according "to the intention of the parties if by law they may: and if "they cannot operate in one form, they shall operate in that "which by law will effectuate the intention." In Osman vs. Sheaffe, 3 Lev. 372, cited in 2 Saun. 97 (a) it is said "that "the Judges of late years have had greater consideration for "the *passing* of the estate, which is the *substance* of the Deed, "than the *manner how*, which is the *shadow*." Looking at this Deed, nothing can be plainer than the intention of the party to convey the land—the evidence shewed that a bona fide consideration was given for it, and the Jury negatived any fraud in the transaction. Under these circumstances, and under the authorities I have mentioned, and others which are to be found in the books, I should have been inclined to think the Court, independently of the Provincial Statutes, might have given effect to this Deed, and prevented the Lessor of the Plaintiff from defeating his own solemn act. I understand from Mr. Justice Parker, that in a late case, the Court of King's Bench decided that these words were not sufficient to create a Feoffment with Livery of Seisin. It is unnecessary however, to decide the case on this, which would have been at all events, doubtful ground—for it appears to me perfectly clear, that helped by the Act of Assembly 26 G. 3. c. 3, this Deed would operate as an absolute Conveyance of the Land therein mentioned. I cannot assent to the position taken in argument by the learned Counsel for the Plaintiff, that the provisions of that Act apply only to Deeds of Conveyance, founded on the Statute of Uses. The words of the 10th section seem to me to be as general as possible, and to have been studiously intended to comprehend all Deeds of Conveyance, and to prevent strict and technical objections, which, if not provided against, might often have worked great injustice and fraud, when from the circumstances of the Province, that strict attention to legal forms in the transfer of real estate could not be supposed to exist; taking the words of the 10th section of the Act of Assembly, this Deed appears to me to be a Conveyance of Land made by writing and duly signed, sealed, delivered, *acknowledged*, and registered—and is therefore good and effectual, for the transferring of the Land therein mentioned, for the intents and purposes therein expressed. This conclusion is one to which I come most willingly, for had I felt myself bound by the strict rules of law to hold this Deed inoperative—I much fear that justice would not have been done between these parties.

PARKER, J.—The argument of the learned Counsel for the Plaintiff who seeks to sustain this rule is as follows:—No Deed

will operate as a Conveyance of land in this Province, except it be such a Conveyance as would operate by the Common Law, or under the Statutes of Uses and Inrollments in England: The Deed of the Lessor of the Plaintiff to Robert and John Jardine, under which the Defendant holds, would not so operate in England; and therefore not in this Province.

The second proposition is, I think true: and I have not arrived at this conclusion without a full investigation, though perhaps such an inquiry, in the state of our Law, is more curious than useful.

It was argued that the Deed would operate as a Feoffment, the Registry supplying the place of Livery of Seisin; as a Bargain and Sale; and as a Release at Common Law. I was rather inclined to think it would operate as a Feoffment, but I have found a very recent case, Doe d. Dearden vs. Maden, 4 B. and Ad. 880, in which it was holden that the words "*remise, release, and forever quit claim,*" although accompanied by a warranty were not sufficient to make the Deed operate as a Feoffment; but as there was sufficient evidence in that case of an anterior possession, it was held to operate as a Conveyance by way of Release. The effect of the *Habendum* in the case before us, might give room for further argument, but it is not necessary to enlarge on this at present.

For a Bargain and Sale, it appears to me that there are not sufficient words—the precise words *bargain and sell* are not requisite, but there must be equipollent words, which *remise, release, and quit claim* can hardly be considered; they have not as yet been so held so far as I can discover, though many other terms have, which may be found in 2 Inst. 672. 2 Com. Dig. 198, 1 Vent. 141, &c.

There was no previous estate or possession on which it could operate as a Release by the Law of England. The Registry under the Act of Assembly could not supply the place of the Deed for a year, in the ordinary conveyance of Lease and Release. I cannot think the word Deed, as used in the concluding part of the 10th s. of 26, Geo. 3. c. 3, has this meaning; but is to be construed as a word *ejusdem generis*, with those in the context and not as a Deed of Conveyance. The Vendor was in the actual possession when the Deed was executed, and for some time afterwards, and there was nothing whereon to found a presumption of any prior Estate in the Releasee. Something might be said on the ground of Estoppel under the authority cited from Cowper 597; but I think the case so clear under our Act of Assembly, that it is not necessary to call in aid the general reasoning of Lord Mansfield,

which may not possibly be as clearly supported on strict legal, as it undoubtedly is, on equitable grounds. It is impossible, I think, to read the 10th sec. of 26 Geo. 3, c. 3, and the 2d sec. of 52, Geo. 3, c. 20, without being satisfied of the intention of the Legislature not to bind us to the same forms of Conveyancing as are used in England. Indeed I conceive the object of the Legislature clearly was to prevent such questions as these arising, and to set up a standard for ourselves by which the validity of a Deed duly registered might be tested; leaving, however, the English Law to stand so far as it might be applicable and be consistent with our local regulations.

The first proposition of the Plaintiff cannot, therefore, in my opinion be sustained; but it still remains to shew that the Deed in question will operate as a Conveyance under our Act—what then are the requisites which our acts prescribe for a valid Transfer of land? I need not repeat the Sections—but construe them thus—a writing duly signed sealed and delivered by the Vendor, by which, for a lawful consideration, the intention and purpose to convey to the Vendee, are sufficiently manifested; the same being duly acknowledged or proved, and duly registered in the Registry Office of the County in which the land lies.

Can any one with our Acts before him look at this Deed, and have any reasonable doubt as to its availability, and according to the argument, if it has not this full operation, it passes no legal estate at all? None of the forms are wanting, and the intention of the Plaintiff's Lessor to transfer all his right and title to the land therein described, is as clear as noon day. He had under the Grant from the Crown an Estate in fee simple, and that estate he has passed. The inclination of the Courts in England has always been to give effect to the intent of parties, as far as the rules of law would admit. Lord Ellenborough states this very strongly in 4 East. 475. In the case I have already quoted from 4 B and Ad.; the Court considered the words *remise, release and quit claim*, as clearly manifesting the intention of the Grantor to pass an interest in the soil; but here we have also in the *habendum* clause, words which satisfy the precise definition of an Estate in fee, "To have and to hold the said premises unto the said R. J. and J. J. their heirs and assigns forever."

"Tenant in fee simple" says Littleton, "is he which hath lands to hold to him and his heirs for ever." "If a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase, To have and to hold, to him and to his heirs."

I perfectly agree with His Honor and the rest of the Court that the Rule must be discharged.

J. A. Street and *Kerr* for the Plaintiff.
E. B. Chandler and *W. Chandler* for the Defendant.

DOE EX DEM HANNINGTON *versus* M'FADDEN.

The Statute of Uses, 27 H. 8, c. 10, and the Statute of Inrollments, 27 H. 8, c. 16, extend to, and are in force within this Province.

THIS action of Ejectment was tried before CARTER, J. at the Kent Circuit in September last.—On the part of the Plaintiff and as part of his Title, a Deed Poll by way of Mortgage of the Locus in quo, from Francis Boucher to the Lessor of the Plaintiff was offered in evidence. This Deed had not been acknowledged, proved or registered pursuant to the Act of Assembly. Boucher derived title by a conveyance from one Jerva, which bore date previous to Boucher's Deed to Hannington, but was acknowledged pursuant to the Act of Assembly on the 28th May, 1835, long subsequent to the date of the Deed from Boucher to Hannington. This Deed was received in evidence as a registered Deed without other proof.

J. A. Street and *Weldon*, for the Defendant, objected that this Deed from Boucher to Hannington, was insufficient to pass the estate it purported to convey, without Livery of Seisin, and that as to Boucher's title, the date of the acknowledgment must be taken as the date of the Deed, and therefore Boucher's title arose subsequent to the conveyance to Hannington.

It was answered by *E. B. Chandler* and *William Chandler*, that the Deed was primâ facie sufficient, and could only be defeated by a registered Deed to a subsequent purchaser: and that if it could not take effect under the Act of Assembly, it might operate under the Statute of Uses; that Boucher's Deed must be held to have been made at the time it bore date, and the acknowledgment related back to that period.

J. A. Street objected, that the Statute of Uses did not extend to this Province, and even if it did, the Statute of Inrollments must also extend, and by the latter Statute the operation of this Deed would be prevented, it not having been inrolled.

It was ruled by His Honor Judge CARTER, that if the Deed depended on the Provincial Laws alone, it was inopera-

tive, but that under the Statute of Uses which his Honor considered applicable to this Province it might operate, and that such operation was not prevented by the want of Inrollment, as (in the opinion of His Honor) the Statute of Inrollments was not applicable, and therefore did not extend to this Province.

On the part of the Defendant, several Deeds were put in evidence and parol testimony was offered to shew that the land which was described in the earlier conveyances as lot No. 4, was the same which was intended to be conveyed to the Defendant by the last Deed by a different description—this evidence was rejected by His Honor. The Lessor of the Plaintiff obtained a Verdict, and in Michalemas Term,

J. A. Street, moved for a rule Nisi, to set the same aside and grant a new trial, on the several points raised at the trial. The Lessor of the Plaintiff claimed title through Jerva and Boucher. The conveyance to Hannington was a Deed Poll of Bargain and Sale by way of Mortgage, which purported to have been made by Boucher on the 24th February, 1817. This Deed must stand independent of the Act of Assembly, 26 G. 3 c. 3. By sec. 6 of that Act, the manner in which a Deed should be proved, or acknowledged and registered, was directed—by the 10th section of the same Act, it was provided that all Deeds and Conveyances made, executed, proved, or acknowledged, and registered according to the terms of the said Act "shall be good, effectual, and available, to all intents and purposes whatsoever, for the passing and transferring such lands, tenements, and hereditaments, and the Estate and possession thereof to the Bargainee and Bargainees, Grantee or Grantees therein named, according to the intents, uses, and purposes in such Deeds and Conveyances expressed, without Livery of Seisin or any other Act or Deed, or Form or Ceremony whatever." And by the 11th section, Deeds and Conveyances so executed, acknowledged, and registered, and copies thereof duly certified, "shall be allowed in all Courts where such Deeds and Conveyances, or Copies shall be produced, to be as good and sufficient evidence as any Bargains and Sales inrolled in any of the Courts of Westminster, and the Copies of the Inrollments thereof are in any Courts of Great Britain." The Deed before the Court could not be assisted by the Act of Assembly not having been "proved or acknowledged, and registered." The question was for the first time presented to the Court, whether a Deed under such circumstances, was a good conveyance in this Province without proof of actual Livery of Seisin. The learned Judge had ruled at Nisi Prius,

that it was a good conveyance under the Statute of Uses—but that Statute could not be separated from the Statute of Inrollments—both were passed in the same year—their operation commenced at the same time—they were in effect incorporated, and formed one Statute, and it was for the Court to determine, if they extended to this Country, or if the machinery of the latter Statute was not in its nature so local as to confine the operation of both to the Mother Country—if it should be held that both were in operation here, then the Deed before the Court not having been inrolled was ineffectual—and again, conveyance by Deed of Bargain and Sale, was a creature of the Statute of Uses, and that Statute as restrained by the Statute of Inrollments applied only to Indentures—but it was evident from the terms of the Provincial Act 26, G. 3, c. 3, that the Statutes of Uses and Inrollments had been viewed by the Provincial Legislature as inapplicable, and therefore they had appointed a more simple mode of acknowledging, or proving and registering Conveyances. No mode of transferring Land could be good, except that pointed out by the Legislature. If property could be transferred independently of the Act of Assembly, Feoffment was the only common Law mode, and that must be accompanied by Livery of Seisin. In support of this point the following authorities were cited, Adams on Ejectment, 281.—American Jurist, No. 5, 151.—Prescott vs. Nevers, 5 Mason Rep. 326.—1 Shepherd's Touch, 54, 223, 507, 508, Chitty's Notes to Statute of Uses.—2 Bl. Com. 327, 336, Attorney General vs. Stewart, 2 Merivale, 163.—Rex v. Vaughan, 4 Burr, 2500. —1 Atk. 544, Sugden on Powers, 7, 10.—4 Com. Dig. 28, 105, 115, 123.

As to the Deed conveying the *Locus in quo* to Boucher, that was only proved by the certificate of acknowledgment and registry endorsed thereon—that certificate bore date the 28th May, 1835, long subsequent to the date of the Mortgage Deed from Boucher to Hannington. At what time then was this Deed delivered, at the date of the Deed or of the acknowledgment? the Instrument was only effectual by its delivery, and there was no proof of its delivery at the date—the acknowledgment was that the Grantor executed the Deed for the purposes therein expressed, and not that he executed it twenty years before the time of the acknowledgment, 4 Cruise Dig. 29.—Com. Dig. Tait. Coke 264, 1 Phil. on Ev. 534. 1 Starkie's Ev. 332. American Jurist, No. 26, 426. 1 Dallas Rep. 384.

As to the evidence offered by the Defendant which was rejected, it was tendered to explain an ambiguity in the descrip-

tion of the Land, not to contradict or alter the effect of the Deed, and for that purpose was admissible—1 Phil. Ev. 527, 528, 534.—Peake's Ev. 113.—6 T. R. 671.—3 Star. Ev. 1018, 21, 24.—1 Shep. Touch. 247, 76 (n) b. 87.—1 Barn. and Ald. 247, 699.—1 T. R. 701.—8 D. & R. 594.

Cause was shown in Hilary Term.

N. Parker for the Plaintiff.

The Statute of Uses and the Statute of Inrollments were distinct and separate Acts of Parliament, and in determining their extension, the former should be viewed without reference to the latter, and should it be considered as a general regulation applicable to the Colonies it must be in force here, whatever might be determined as to the Statute of Inrollments. The Statute of Inrollments contained provisions which were essentially local; Deeds were by that Statute required to be entered and inrolled at Westminster; could a Deed of Land in this country be so entered and enrolled? If it were necessary for a party to plead an Inrollment, he must state the Court in which the Deed was inrolled. Cro. Jac. 291—1 Saund. 250—2 Saund. 12—could he plead a Deed duly entered and enrolled in the Supreme Court of New-Brunswick? and even if such an Inrollment could be made or pleaded, it would be ineffectual by the operation of the Province Law—it would be held fraudulent as against a subsequent purchaser, unless registered in pursuance of the Act of Assembly.

In England there was a particular Officer, the Clerk of the Inrollments, but no such officer was known here.

The Provincial Statute 26, G. 3 c. 3, shewed by its terms that the Legislature did not contemplate that the Statute of Inrollments could apply or have any operation here, else why take the English Practice as an example for admitting copies as evidence.

Assuming that the Statute of Inrollments did not extend to this Province, could the two be separated? he contended that they could—that the Statute of Uses was such a general regulation, as was applicable to the Colonies, that it was complete in itself, and could be, and was effectual without assistance from the other Statute—it had been held to extend in the Old Colonies. 4 Kent, Com. 482, 4 Danes Abr. 214.

The next question was, if the Deed from Boucher was a sufficient conveyance within the Statute of Uses; it had sufficient words of conveyance to create a Feoffment at Common Law, and it had been held what was good as a Feoffment at Common Law would raise a Use.

Another point worthy of consideration arose from the relation of the parties, Boucher & Hannington as Mortgagor and Mortgagee. Boucher was in possession at the time of making the Deed, and the rule of Law was that the Possession of the Mortgagor was the possession of the Mortgagee—if a time were appointed for the redemption of mortgaged Premises, and it was not expressed that the Mortgagor should remain in possession, it was tacitly implied. If Boucher had declared subsequent to the Deed that he held as Tenant to Hannington, or as Mortgagor in possession, it would have been sufficient proof of Livery of Seisin—if then his parol declaration would have been sufficient, so solemn an Instrument as a Deed must be good. 1 Powell, 155, 157, 3 Powell, 1034—Doe vs. Macey, 8 B. & C. 767.—Doe vs. Mason, 3 Camp. 7, and could only be defeated by a conveyance to a bonâ fide purchaser, for a valuable consideration duly registered according to the terms of the Act of Assembly. The Deed from Jerva to Boucher when recorded related to the period of its date, it was acknowledged to have been executed for the purposes therein mentioned; Boucher moreover was in possession at the time of making the Mortgage Deed to Hannington.

E. B. Chandler, followed on the same side. If the Statute of Inrollments ever extended to the Colonies it was virtually repealed by the Act of Assembly, 26 G. 3, c. 3. A Deed of Land in this Province inrolled at Fredericton or Westminster would be avoided by a Deed duly registered, 1 Bac. Abr. Tit. Bargain and Sale, E. The Act of Assembly did away with the Statute of Inrollments, and itself only related to subsequent purchasers for valuable consideration.

As to the admission of parol evidence contended for by the Counsel for the Defendant, if the position could be maintained, the protection afforded by the Registry Act, would be at an end. When parol evidence had been admitted, the Deed had been consistent with the evidence when given, Rosc. Dig. 11. 5. T. R. 564, 13 Star. Ev. 1025—1028.

J. A. Street, in support of the Rule. The Statute of Uses as contended for on the other side did not exist, and never had existed in England. The Statute Law only applied to Colonies as part of the Common Law; the two statutes were contemporaneous, and if Colonists brought with them the provisions of one it could only be as restrained or affected by the other, and unless both were applicable, neither could apply—the Statute of Uses so far as related to bargains and sales of freehold was in effect repealed by the Statute of Inrollments.

The question whether a man could dispute his own Deed did not arise here.

It could not be contended that a Mortgagee could stand on a better footing with respect to the Deed than if the Instrument had been an absolute conveyance. [CHIPMAN, C. J.—This is not ejectment between Mortgagor and Mortgagee.]—The Counsel was stopped on this point. As to the Deed from Jerva to Boucher which was recorded the day previous to the Demise in this cause. [CHIPMAN, C. J.—The 10th section of the Act of Assembly will help this; the date is to be taken as the time of delivery, unless the contrary be shewn.]

In this Term the Court delivered their opinions.

CHIPMAN, C. J.

The first question which arises in this case is on the operation and effect of an unregistered Deed produced in evidence, and proved by a Witness on the part of the Plaintiff. The Deed is a Deed Poll in the following terms:—

"Know all Men by these Presents, that I, Francis Boucher, of "Bucktush, in the County of Westmorland, and Province of New-"Brunswick, (Farmer,) for and in consideration of the sum of Fifty "Pounds of lawful money of the said Province, received to my full "satisfaction of William Hannington, Junior, of Shediac in the Pro-"vince of New-Brunswick, (Trader,) the receipt whereof I do hereby "acknowledge, have Granted, Bargained, and Sold, and by these Pre-"sents do Give, Grant, Bargain, Sell, Convey, and Confirm unto him "the said William Hannington, his Heirs and Assigns, two certain "Lots or Parcels of Land, situate, lying and being on the North side "of Bucktush River, containing in the whole one hundred and fifty "acres, be the same more or less, as laid down in the Grant, bounded "on the East by lands in the possession of Charles Cormier, and on "the West by lands in the possession of Benjamin Girouard, (the said "lots being now in the possession of the aforesaid Francis Boucher.) "To have and to hold the said lots or parcels of Land, together with "all the Buildings, Improvements, and Appurtenances thereunto be-"longing, unto the said William Hannington, his Heirs and Assigns, "for ever. Provided, nevertheless, that if the said Francis Boucher "shall pay or cause to be paid to the said William Hannington, his "Heirs or Assigns, one certain Note of Hand for Fifty Pounds, bear-"ing date the twenty-fourth day of February, one thousand eight "hundred and seventeen, with lawful Interest thereon, and that on or "before the twenty-fourth day of February, that will be in the year "of our Lord one thousand eight hundred and nineteen; then the "within Deed, being given for the security for the payment of the "within named sum, to be void; otherwise to remain in full force and "virtue. In Witness whereof, I have hereunto set my Hand and "Seal, this twenty-fourth day of February, one thousand eight hundred "and seventeen, and in the fifty-seventh year of His Majesty's Reign.

"FRANCIS BOUCHER, his X mark.

"Sealed, Signed, and Delivered in presence of
"WILLIAM HANNINGTON, SEN.
"TANNIS LAW COLLET, his X mark."

The learned Judge at the trial ruled that this Deed, although not acknowledged or proved and registered according to the provisions of the Provincial Registry Acts, was sufficient to pass the Estate which it purported to convey, liable, however, to be defeated by a registered Deed to a subsequent purchaser of the same Land for valuable consideration. The opinion of the learned Judge upon this point was objected to on the part of the Defendant, and formed the principal ground upon which the rule Nisi for a new trial was obtained. This rule for a new trial has been elaborately and ably argued by the learned Counsel on both sides, and presents, for the first time, to my knowledge, within this Province, a very important question relating to the conveying of Lands. On the one hand, it was contended on the part of the Defendant, that the Deed which I have recited, not being accompanied by Livery of Seisin, is not sufficient to pass a Freehold at Common Law, and that allowing it to be sufficient for this purpose by the operation of the Statute of Uses, (27 H. 8, ch. 10,) still, if the Statute of Uses is held to extend to this Province, the Statute of Inrollments (27 H. 8, ch. 16.) must be held to extend also; and this latter Statute would prevent any Inheritance or Freehold from passing under this Deed, it being a Bargain and Sale and not indented and inrolled according to the provisions of the Statute. On the other hand, it was contended on the part of the Plaintiff, that the Statute of Uses did certainly extend to this Province, and the Deed was therefore sufficient by the operation of this Statute to pass the Estate, which it purported to convey, and that the Statute of Inrolments was not in force in this Province, and the Deed therefore, stood unaffected by this latter Statute.

It was further contended on the part of the Plaintiff, that if the Statute of Inrollments had ever extended to this Province, it was virtually repealed by the Provincial Registry Act. The question, what acts of the Parliament of the mother Country shall be held to extend to a Colony is undoubtedly one of the most grave questions which can occupy the attention of a Colonial Judicature, and may be in many cases one of considerable perplexity. The Rule laid down by Blackstone (1st Com. 107) is that "Colonists carry with them only so much of the English Law as is applicable to their own "situation, and the condition of an English Colony; such for "instance as the general rules of Inheritance; and of protection from personal injuries." The same doctrine in substance is maintained by Lord Mansfield, (Rex vs. Vaughan 4 Burr: 2500—Campbell vs. Hall, Lofft. 710,—2d Howell, State Trials 289.) In the case of the *Attorney General vs.*

Stewart 2 Mer. 143, in which the question was, whether the Statute of Mortmain (9th Geo. II. ch. 36,) extended to the Island of Grenada, Sir William Grant, the Master of the Rolls, also adopts substantially the same Rule, and makes the determination of the point to depend upon this consideration, "whether it be a law of local policy, adapted solely to the "Country in which it was made, or a general regulation of "property equally applicable to any country in which it is "by the Rules of English Law that property is governed." He comes to the conclusion that the Mortmain Act is quite inapplicable to Grenada or any other Colony, because "in "its causes, its objects, its provisions, its qualifications, and "its exceptions, it is a law wholly English, calculated for "purposes of local policy, complicated with local establish-"ments, and incapable without great incongruity in the effect, "of being transferred as it stands into the code of any other "country."

The two Statutes now under consideration, the Statute of Uses and the Statute of Inrollments, having been passed in the Reign of Henry the Eighth, long before the planting of any of the American Colonies, no question arises upon the time of their being passed, in reference to the period of any Colonial Settlement; and the only matter for consideration, with respect to each of them will be, whether it be applicable to the Colonies, or, in the words of Sir William Grant, whether it be "a law of local policy" adapted solely to the particular circumstances and condition of England, or whether it be "a general regulation of property equally applica-"ble to any country in which it is by the Rules of English "Law that property is governed." With respect to the Statute of Uses, by the operation of which the person who has the Use, that is, is entitled to the profits and benefit of land, is held to be in the possession of the land itself, the provisions of it are so mingled with the whole body of the English Law of Real Property, that no doubt can exist as to its applicability in every country, where that law forms the basis of jurisprudence. Lord Bacon describes it as "the Statute which of all others hath the greatest power and operation over the heritages of the Realm:" and it was, very generally, if not universally considered to have been in force in the old American Colonies, (4 Kent's Com. 1st Ed. 283, 452, 477, 482, 1st Dane's Abr. 9th do. 362,) I cannot entertain a shadow of doubt that the Statute of Uses is in force in this Province.

The remaining question is whether this Statute is so in force, without its concomitant passed in the same Session of Parliament, the Statute of Inrollments. In order to decide

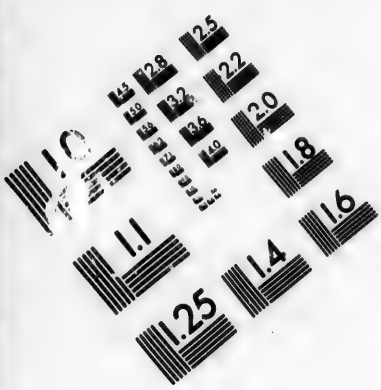
this question, we must examine the Statute of Inrollments for the purpose of ascertaining whether this be a general Regulation of property, applicable, equally with the Statute of Uses, to any Country where the Law of England prevails. This Statute provides, "that no Manors, Lands, Tenements, or "other Hereditaments shall pass, alter or change from one to "another, whereby any Estate of Inheritance or Freehold "shall be made or take effect in any person or persons, or any "use thereof to be made, by reason *only* of any *Bargain and* "*Sale* thereof, except the same bargain and sale shall be "made by writing, indented, sealed and inrolled in one of the "*King's Courts of Record at Westminster*, or else within the "same County or Counties where the same Manors, &c. so "bargained and sold lie or be, before the *Custos Rotulorum* "and two Justices of the Peace, and the Clerk of the Peace of "the same County or Counties, or two of them at the least, of "which the Clerk of the Peace to be one, &c. &c."

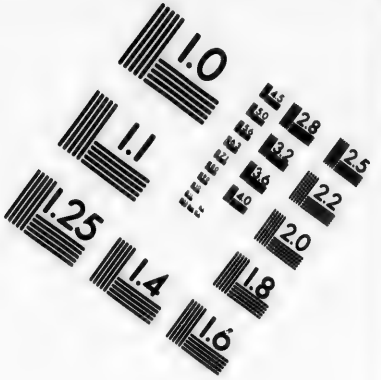
Mr. Hargrave in his notes upon Coke Littleton, (Coke Litt. 48 a n. 3) explains the objects of the Statute of Inrolments in the following terms: "Those who framed the Statute "of Uses evidently foresaw, that it would render Livery un- "necessary to the passing of a 'Freehold,' and that a Free- "hold of such things as do not lye in Grant, would become "transferable by Parol only, without any solemnity whatever. "To prevent the inconveniences that might arise from a mode "of conveyance so uncertain in the proof, and so liable to "misconstruction and abuse, it was enacted in the same Ses- "sion of Parliament, that an Estate of Freehold, should not "pass by Bargain and Sale only, unless it was by Indenture "inrolled—see 27 H. VIII. c. 16. The objects of these Pro- "visions evidently were—first, *to force the contracting parties* "*to ascertain the terms of the conveyance, by reducing it into* "*writing*; secondly, *to make the proof of it easy, by requiring* "*their Seals to it, and consequently the presence of a witness*; "and lastly, *to prevent the Frauds of secret conveyances, by sub-* "*stituting the more effectual notoriety of Inrolment, for the* "*more ancient one of Livery.*" These three objects of this Statute, namely, the ascertainment of the intent of a conveyance by the reduction of it to writing, the facilitating the proof of it, and the preventing of Frauds by the notoriety of Inrollment, are evidently applicable to any country, where the Statute of Uses and the English Law of Real Property are in force.

The only difficulty in the way of extending this Statute to a Colony, arises from the designation of the places in which the Inrolment is required to be made; and if there should be no

establishment in a Colony corresponding with those in England, designated in the Act for making the Inrolment, I agree that it would not be practicable to transfer the operation of this Act to such Colony. The Act requires the Inrollment to be made "in one of the King's Courts of Record at Westminster," or else within the County where the Lands lie "before the Custos Rotulorum, and two Justices of the "Peace or two of them." Now as this Province is divided into Counties in like manner with England, and as in each County there is a Custos Rotulorum and a Clerk of the Peace, and Justices of the Peace, also with like official powers as in England, it is quite practicable to carry the Statute into effect, so far as respects Inrollments in the Counties. With regard to Inrollment in the King's Courts of Record at Westminster, Lord Coke's comment upon this part of the Statute is as follows, (2d Inst. 674.) "*In any of the King's* "*Courts of Record at Westminster*, that is, in the King's "Bench, The Chancery, The Common Pleas, and the Ex- "chequer—and though the words be, "at Westminster," for "that at the time of the making of this Act, these Courts "were there; yet if these be adjourned into another place, the "Inrolment may be in any of these Courts, for the Inrol- "ment is confined to *the Courts wheresoever they be holden.*" The Supreme Court in this Province has by the express terms of the Commissions to the Judges, all the powers of the three Superior Courts of Common Law in Westminster Hall; and there is also in the Province a Court of Chancery with jurisdiction and powers similar to those of that Court in England. We have therefore within the Province all the local establishments, constructed upon the plan of English Institutions, which are necessary for carrying the Statute into effect.

The practice of Inrollment moreover, is not one which originated with the Statute of Inrollments. It is required in the Statute, not as a new proceeding, then for the first time established, but as one of familiar occurrence, which the Statute makes imperative with regard to Deeds of a certain description, namely, Bargains and Sales of Estates of Inheritance and Freehold. In 14th, Vin. Abr. 443, tit. Inrolment, citing 2d Lilly's Prac. Reg. 67, a definition is given of the term, and "Inrolment of a Deed" is stated to be "the enter- "ing of it fairly upon the Records of one of the *King's* "*Courts of Record at Westminster*, or at the *Quarter Sessions* "*of the Peace.*" So that Inrollment of a Deed, *ex vi termini*, "independently of the Statute, imports an entry of the Deed upon the Records of the Courts named in the Statute; this practice of Inrollment being evidently an incident to these





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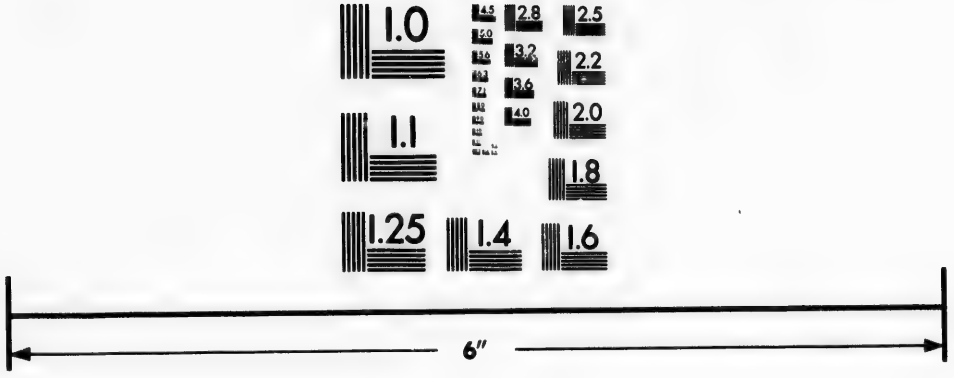

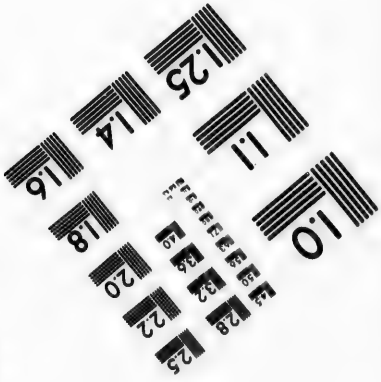

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Courts at Common Law—another circumstance which strongly marks, that the inrolling of Deeds is a proceeding at Common Law, entirely regulated by the Courts themselves, and not originating with or derived from this Statute, is, that the Statute contains no provision for Deeds being acknowledged before they are inrolled; and yet it is laid down in Coke, Litt. 225, 6, that no Deed can be inrolled unless duly and lawfully *acknowledged*. And in Lilly's Practical Register, as cited in Jacob's Law Dictionary, Title, "Inrollment," it is stated, that "every Deed before it is inrolled, is to be acknowledged to be the Deed of the Party before a Master of "the Court of Chancery, or a Judge of the Court wherein "inrolled, which is the Officer's Warrant for inrolling the "same." And in 1 Salk. 389, there is a general rule of the Court of King's Bench "That all Deeds shall be acknowledged on the plea side in this Court and not on the Crown "side; and that the acknowledgment shall be in open Court."

It appears from the case of Worseley vs. Filisker, 2d. Rolles, Rep. 119, cited 14th Vin. Abr. 443, that the Inrollment Office in the Court of Chancery, was not erected until the 16th Eliz. many years after the passing of the Statute of Inrolments—hence it follows, that the existence of a special office in the Courts for the purpose of inrolment is not a necessary preliminary to the operation of the Statute.

The business of Inrolment being then an incident at Common Law to the Courts mentioned in the Statute of Inrolments, and a matter regulated by the Courts themselves; when Courts are established in a Colony with powers and incidents at Common Law identical with the powers and incidents of the Courts in England mentioned in the Statute, all difficulty in the application of the Statute for the want of local establishments to carry it into effect, vanishes.

The extension of Statutes to this Province which are in terms confined to the Courts of the Mother Country, is not by any means without precedent, as is obvious from two very familiar instances, namely, 1st. the Stat. 4th Anne, c. 16, sec. 20, authorizing the assignment of Bail Bonds, which is expressed to apply to persons arrested by any process "issuing "out of any of His Majesty's Courts of Record at West-"minster"—and 2dly, the Stat. 14th Geo. II. c. 17, authorizing Judgments as in case of a non suit; which in like manner is expressed to apply to suits in the King's Courts of Record at Westminster, the Court of Great Sessions in Wales, and the Courts of the Counties Palatine—and yet each of these Statutes is daily acted upon in this Province, and must be considered as fully incorporated with our Provincial code.

Upon full consideration of this point, in the aspect in which I have now presented it, I have come to the conclusion that the Statute of Inrolments being a cotemporaneous modification of the Statute of Uses, equally applicable in principle with the Statute of Uses to any country in which the Law of England is in force, and there being in this Province local Courts with powers and incidents at Common Law for carrying the Statute of Inrolments into effect, the Statute of Inrolments equally with the Statute of Uses extends to, and is in force within this Province.

As to the fact of the Statute of Inrollments having been considered to be in force in the old Colonies, Chancellor Kent in that part of his commentaries in which he treats of conveyances, expresses himself as follows:—

"Conveyance by Lease and Release was the mode univer-
"sally in practice in New-York until the year 1788,—the re-
"vision of the Statute Law of New York in 1788, which re-
"enacted all the English Statute Laws deemed proper and ap-
"plicable, and which repealed the British Statutes in force in
"New-York while it was a colony, removed *all apprehension*
"*of the necessity of Inrollment of Deeds of Bargain and Sale*,
"and left that short plain and excellent mode of conveyance to
"its free operation: the consequence was that the conveyance
"by Lease and Release, which required two Deeds or Instru-
"ments instead of one, fell immediately into total disuse, and
"will never be revived." (4 Kent's Com. 1st edit. 452.)

From this passage, it is evident, that the Statute of Inrolments was at least *apprehended* to have been in force in the Province of New-York, and that this apprehension was so strong, in its practical effect, as to cause the universal prevalence in that Province, of the conveyance by Lease and Release. There is a case I understand in one of the Massachusetts Reports, in which it was assumed that the Statute of Inrollments had never been in force in that Province. This case will be remarked upon by another member of the Court. It was argued on the part of the Plaintiff that even if the Statute of Inrolments was in force at the time of the erection of the Province, it was repealed by the Provincial Registry Act, 26th Geo. III. c. 3. the provisions of which Act, it was contended were inconsistent with the Statute of Inrolments. I do not perceive any inconsistency in the two Acts, the provisions of which very well stand together. The Provincial Registry Act, (S. 1.) provides that Deeds may be registered, and that unregistered Deeds shall be adjudged fraudulent and void against subsequent Purchasers and Mortgagees for valuable consideration, whose Deeds shall be registered. And the 10th

section of the same Act provides "that all conveyances made in "writing, and signed, sealed, and delivered, acknowledged, and "registered, according to the provisions of that Act shall be "sufficient to pass Estates in Lands, according to the intent of "the Deed without Livery of Seisin or any other Act or cere-"mony whatever." As compared with the Statute of Inrollments, the effect of he first section of the Provincial Registry Act, would undoubtedly be that a Bargain and Sale although inrolled according to the provisions of the Statute of Inrolments, would not, any more than a Deed of Feoffment at common law, accompanied by Livery of Seisin, be good against a registered Deed to a subsequent purchaser for valuable consideration, unless registered according to the provisions of the Registry Act. But this section leaves untouched the provision of the Statute of Inrolments, that no Estate of Inheritance or Freehold shall pass at all from the Bargainor to the Bargainee, unless the requisites of that Statute are complied with. The Provincial Statute in this respect is similar in its enactment to the English Registry Acts; I refer particularly to the Stat. 8 Geo. II. c. 6. for establishing a Registry in the North Riding of York, from which Statute it would seem that many of the clauses of the Provincial Act were copied. Yet so far from this Statute being considered as repealing the Statute of Inrollments with regard to the North Riding of York, the latter Statute is expressly recited in the twenty-first section of it, which makes Bargains and Sales registered according to its provisions, of equal validity with Bargains and Sales inrolled according to the Statute of Inrollments—so the tenth section of the Provincial Registry Act, the words of which are affirmative, and the effect of it enlarging, undoubtedly makes a Bargain and Sale, in respect to which the provisions of that Act have been complied with, sufficient to pass an Estate of Freehold or Inheritance, although it be not inrolled according to the Statute of Inrollments; but it leaves untouched all Bargains and Sales with regard to which its own provisions have not been complied with. Such being the operation of the Provincial Registry Act, if the Statute of Inrollments be not in force, there is no Law in this Province, even at this day, to prevent an Estate of Freehold or Inheritance from passing under the Statute of Uses, by writing alone without Seal, as the Statute of Frauds requires a Writing only, not a Deed under Seal.

It was further argued on the part of the Plaintiff, that the relation of Mortgagor and Mortgagee, having been established by the Deed in question between the Parties to it, it is not competent for any person holding under the Mortgagor, as the

Defendant does, to invalidate it. Upon this ground of argument it need only be remarked, that if the Deed be not sufficient to pass the Estate which it purports to convey, the relation of Mortgagor and Mortgagee was never established.

Upon the whole I am of opinion that the Deed upon which this discussion has arisen, not having been acknowledged or proved, and registered according to the provisions of the Provincial Registry Act, and being a Bargain and Sale not indented and inrolled according to the Statute of Inrollments, is not sufficient to pass the Estate of Inheritance which it purports to convey, and therefore upon this ground, if the point had been reserved at the trial with leave to move to enter a non suit, a nonsuit must have been entered; but this not having been done, a new Trial must be ordered.

There was another ground upon which the motion for a new Trial was argued, and that was, the improper rejection of evidence by the learned Judge who tried the cause. It is unnecessary to say more on this point, than that I am of opinion that the evidence was properly rejected.

Botsford, J.—I entirely agree in the opinion expressed by His Honor the Chief Justice.

Carter, J.—The material question on which this case depends, is the validity of the Deed of Mortgage from F. Boucher to W. Hannington, Jun. because if it be determined that this Deed is invalid, the Lessee of the Plaintiff has failed to make out such a legal title, as will enable him to recover in an action of Ejectment.

The view which I took of this point at the trial certainly was this:—that the Deed was inoperative if it depended on the Provincial Laws alone, but that it might operate under the Statute of Uses, which I considered applicable to this Province, and that such operation was not prevented by the want of Inrollment, as I considered, the Statute of Inrollments did not extend to this Province. On full consideration of the case and the arguments which have been adduced on both sides, I think that on the last point, viz. as to the extension of the Statute of Inrollments to this Province, the opinion I expressed at the trial was wrong. I confess I had very great doubts on this point, and have felt much difficulty in coming to a decision upon it; the point being one perfectly new, and on which there is no direct authority, and hardly any decision which may be an authority by analogy. After the elaborate Judgment which has already been given, I do not think it necessary to go at any great length into all the bearings of this question, but shall state, very briefly, the reasons which bring me to the con-

clusions at which I have arrived. I take it that of the Statute Law of England which existed at the original settlement of this Province, so much is in force here as is adapted to the circumstances of the Province, and is not local in its nature and provisions. On this principle there can be no doubt that the Statute of Uses must be in force here; and there seems to be authority in the passage cited from Dane's Abr. to shew that in Colonies similarly circumstanced, this Statute was considered in force. How, then, does this principle affect the Statute of Inrollments? It cannot be said that the policy of this Statute is local, that policy being to give publicity to Deeds of Bargain and Sale of freehold property, which, but for this Statute, might have been, under the Statute of Uses, of a private nature. This object is one which is equally applicable to this Province. Nor is this object fully effected by the Registry Acts, so as to render the Statute of Inrollments unnecessary, for besides this consideration, that if the Statute of Inrollment formed part of the English Law which extended to the Province at its first settlement, it would still operate unless repealed by some Provincial enactment, the Registry Acts do not fully effect this object—because a Deed of Bargain and Sale, so far as it depends on them, is good against all but subsequent purchasers for valuable consideration without any registry or inrolment; whereas, by the Statute of Inrollments it is absolutely void if not inrolled within six months after the date. Wherever, therefore, the Statute of Uses will extend, it appears to me that the policy of the Statute of Inrollments will also extend. Is there, then, any thing in the provisions of that Statute which shews that it is local? On first considering this, it certainly appeared to me that the provision that the inrolment of Deeds of Bargain and Sale should be made in one of the King's Courts of Record at Westminster, shewed that the Statute would only apply to that country over which those Courts had jurisdiction. But on consideration I think that this provision is not so purely local as the words, strictly taken, would imply; because, if it were so, an Inrolment in the Court of King's Bench when sitting in any other part of England than Westminster, would not be good. Yet we have Lord Coke's authority in the 2d Inst. 673, 674, that such Inrollment would be good. The meaning of the words seems to be, that the Inrollment must be in one of the King's Courts of Record, viz. the King's Bench, Common Pleas, or Exchequer. For this Province, this Court is undoubtedly the King's Court of Record, combining the powers and authority of the King's Bench, Common Pleas, and Exchequer, and therefore an Inrollment of a Deed of Bargain and Sale in this Court

would, I think, meet the provisions of the Statute of Inrollments as applicable to this Province. For want of such Inrollment, I am of opinion the Deed in question is void, and therefore the Plaintiff failed in making out a legal title, and on this ground I think there should be a new trial.

On the other question, with respect to the rejection of the parol evidence tendered on the part of the Defendant to shew that the land intended to be conveyed by the Deed from Casey and Jerva to the Defendant, was the land described in the former Deed as Lot No. 4, I have seen no reason to alter the opinion I expressed at the trial.

PARKER, J.—I entirely concur in the Judgment which has been pronounced on the principal point reserved in this case, namely, whether a legal Estate in fee of lands in this Province will be considered to have passed by Deed of Bargain and Sale, on the mere proof of the signing, sealing, and delivery by the Bargainor. It is important as involving the question of the extension and adaptation of the English Statute Law, in deciding which we have no very definite rule to guide us. That Colonists take with them the Statute Law to a certain extent (as well as the Common Law) is clear; and when we consider the state of the Common Law which recognized no valid transfer of the legal Estate in land, of freehold or inheritance, beside that by Feoffment with livery of seisin; the period at which the Statute of Uses and Wills, 27 H. 8. c. 10, was passed and the general nature of its provisions which, intending to carry into effect *at law* what Courts of *equity* had already enforced, were certainly as applicable to the condition of new Colonies, as to that of the mother country, I cannot doubt of the extension of that Statute to this Province. If additional reasons were required to confirm this opinion they would be found in the general understanding of the Legislatures, and Courts in the former North American Colonies, and of the most distinguished American Jurists of the present day.

If then the Statute of Uses extends, it must be admitted that a Statute passed *in pari materiâ* during the same Session of Parliament must extend also, unless its provisions be wholly local or inapplicable to our Colonial situation, or unless there be something in that or some other English Statute limiting its operation to the realm of England; and as it remains in force there, it must also be in force here, unless actually or virtually repealed by some Act of the Provincial Assembly.

That the intention of the Statute of Inrollments (notwithstanding the manner in which it has been evaded by the contrivance of lease and release) was to control the operation of

the Statute of Uses in the transfer of real Estate, we know from the concurring testimony of the best writers near the time, and since. It is difficult to select from among them, I will quote Lord Bacon's observation, and that of a late Judge.

Lord Bacon in his Elements, 2d Tract. p. 66, after commenting on the Statute of Uses, proceeds as follows:—

"But the Parliament that made that Statute did foresee "that it would be mischievous that men's lands should so sud- "denly upon the payment of a little money be conveyed from "them, peradventure in an Ale-house or a Tavern upon "strainable advantages, did therefore gravely provide another "Act in the same Parliament, that the land upon payment of "this money should not pass away, except there were a wri- "ting indented made between the said two parties, and the "said writing also within six months inrolled in some of the "Courts at Westminster, or in the Shire Rolls in the Shire "where the land lieth; unless it be in Cities or Corporate "Towns where they did use to enroll Deeds, and there the Sta- "tute extendeth not."

Mr. Baron Graham, in 3d Price, 507, says,—"The his- "tory on Inrollments is well known.—The preamble of the "27 H. 8. c. 10, details the inconveniences which arose from "the effects of the clandestine nature of the doctrine of Uses, "and it was intended that those inconveniences should be ob- "viated by the Act requiring deeds of bargain and sale to be "inrolled in some Court of Record, thereby supplying that no- "toriety from the absence of which, in such modes of con- "veyance, so many mischiefs were said to have arisen."

That we have not the same authority for the extension of this Statute as there is for the other, is not surprising when we consider the fact that *Registration* of Deeds was provided for among the earliest acts of all the Colonies. There was an ordinance of the Governor and Council in Nova Scotia passed in 1752, for this purpose, ratified and confirmed by the General Assembly in their first Session, 32 Geo. 2d. c. 2, (when that which is now New-Brunswick formed part of Nova-Scotia;) and a registry is provided for those who choose to take advantage of it, by one of our first Acts after this Province was erected; and when the facility with which registry may be made, without any limitation as to time, under our Registry Acts and the priority which they clearly give to registered conveyances are considered, it is less to be wondered at that the present question should not have arisen before, than that it should now be agitated.

I quite agree that these Acts were passed for the regulation of registered Deeds, leaving unregistered conveyances on the

same footing as they were before, and no farther interfering with them, than was requisite to give that effect to the registry which the Legislature contemplated; and that although registry, if complied with, would supercede the necessity of enrollment, it no more operated as a repeal of the Statute of Inrollments here, than the invention of Lease and Release did in England. The assertion that conveyance by bargain and sale inrolled is out of use in England is not quite correct, as may be seen by many instances in the books at different periods. The establishment of Registry Offices in some of the Counties in England did not repeal the Statute of Inrolments as to them—the registry of bargains and sales, is by the Act made *as* effectual and available *as Inrollment*, but the Deed may still be inrolled, and must be registered or inrolled.

The fact stated by Mr. Chancellor Kent in the 4th vol. of his commentaries p. 482, already referred to by His Honor the Chief Justice, is very strong to evince the opinion of the profession in New-York; for there appears no other sufficient reason for the general use of the double conveyance to pass the freehold or fee there and elsewhere, than the restraining effect of the Statute of Inrollments upon the one simple Deed, I should incline to think that while using the terms "apprehension of the necessity of Inrollment, &c." Mr. Chancellor Kent, meant to include registered and not merely unregistered Bargains and Sales, as Registration seems to have been almost universally practised in New-York. Until a short time since I had been under the impression that in the neighbouring Colony (now State) of Massachusetts, the question of Inrollment had not arisen in consequence of one of their early Acts, in the reign of William 3d, having provided a simple mode of conveyance; but I find by a case reported in 5 Tyng's Mass. Rep. 24, that of Marshall vs. Fisk, which occurred in the Supreme Court of that State in 1809, that the Statute of Inrollments has been held not to extend to that country; and that the delivery of a Deed of Bargain and Sale was sufficient to convey real Estate until the Colonial Ordinance of 1641. Their Registry Act of 1783, I perceive, provides "that no "conveyance of a freehold in, or a lease for a longer term than "seven years of any land shall be good and effectual in the "law to hold such land against any person, *but the Grantor* "*and his Heirs*, unless the Deed of conveyance be acknow- "ledged and registered in the County Records." It is not stated in that case, nor am I aware at what particular period of their history, in what manner or on what grounds it was determined that the Statute of Inrollments did not extend to Massachusetts; but without questioning the propriety of their

decision, I think a sufficient distinction may be found between the Institutions of the old Colony and Charter Government of Massachusetts, and our own, that would render a Statute wholly inapplicable there, which might nevertheless be very suitable to us, for the Rule is not so general that we must in order to give effect to a Statute here, determine that it is applicable to the state and condition of all Colonists. Statutes may extend, but yet be without any operation until there are Institutions in a Colony to which their provisions are applicable. The very origin and constitution of the Superior Court in Massachusetts gave it probably a different character from that of this Province, and may have formed the ground of their decision. If I recollect rightly, Governor Hutchinson says, the Writs in their early days, did not run in the King's name.

The registry acts of that Colony would appear to have followed the decision, and were perhaps consequent upon it, (though of this I can speak with no certainty,) but I will for a moment consider how far our Registry Act is reconcileable to the notion, that the Statute of Uses extends without the Statute of Inrollments. By the former of these Statutes the Land would pass without any Deed or even writing. A writing however, was rendered necessary by the Statute of Frauds, and both in Nova-Scotia and New-Brunswick, the provisions of this Statute were introduced among the earliest of the Colonial Acts, so that the transfer without writing may be considered as not having existed; but still we have the possession transferred to the use without Deed; but supposing even a Deed to be necessary, no further Act would be requisite. Then comes the Registry Act, 26 Geo. 3, c. 3, which by an express section, the 10th, provides, "that all bargains "and sales of any lands, tenements, and hereditaments by "Deed indented or Deed Pole, and all grants and convey-"ances whatsoever, made by writing, and duly signed, sealed, "and delivered, and *acknowledged by the Grantor or Gran-"tors, &c. which shall be entered and registered at full length, "by the Register in the Public Office, &c.*" shall be good, ef-"fectual and available to all intents and purposes whatsoever, "for the passing and transferring such lands, &c. and the "Estate and possession thereof to the bargainee and bar-"gainees, grantee and grantees therein named, according to "the intents and uses, and purposes, in such Deeds, and con-"veyances expressed without livery of seisin, or any other act "or Deed, or form or ceremony whatever." This section being confined to Deeds *acknowledged* by the grantor or bargainor, a further Legislative provision was made (52 Geo. 3, c. 20, sec. 2,) giving the same effect as above to all deeds, grants,

and conveyances, *duly acknowledged or proved, and duly registered*; which Legislative provisions were unnecessary, indeed almost absurd, if, as now contended by the Plaintiff's Counsel, the legal seisin would pass by the deed alone; and unregistered transfers are governed only by the Statutes of Uses and Frauds. I think no one can carefully read the two sections I have quoted, without being of opinion the Legislature considered the Law as it stood, without such provision would restrain Lands from passing according to the intent of parties by mere Deeds of Bargain and Sale, or simple grants and conveyances, though duly registered according to the Act, and therefore an express clause was necessary to give proper effect to the registry. For, without this, conveyances would probably have been made here as in the old State of New-York, by Lease and Release; thus subjecting the parties to the unnecessary trouble and expence of this double form, for the very same purpose which originated it in England, viz. evading the Statute of Inrollments.

There is, I should observe, a great difference between the wording of our Act, and that of the Massachusetts Act of 1783; the words of our Act are words of extension, those of the other, words of restriction; well suited to the different state of the law produced by the reception or rejection of the Statute of Inrollments.

However it is said (and the position was first taken by the Counsel for the Defendant as a ground for the Statute of Uses not extending,) that as the Statute 27 H. 8. c. 16, provides only for enrolment in the Courts at Westminster, or by certain Officers in the several Counties; no enrolment made in this Province would be valid, and that we are driven to the alternative of rejecting the Statute altogether, (as was done in Massachusetts) or allowing the enrolment at Westminster to be good. That the enrolment of Deeds at Westminster would be unsuitable to the state and condition of settlers in an American colony, can hardly be denied; but be this as it may, I quite concur with the rest of the Court in thinking that without resorting to the alternative just mentioned, and "without any great incongruity in the effect" this act is capable of being transferred to our code, to an extent sufficient to give it application, if not to the whole; my opinion being that the Supreme Court as part of its Constitution possesses the power of enrolment, which was not indeed conferred on the Courts at Westminster by the Statute, but existed by the Common Law; and was in use long before the reign of Henry 8th. We have intrinsic evidence of this in the Statute itself, which gives no new Ministerial power, appoints no officers, or fees for the

enrolment in the King's Courts, but refers to it as a power already exercised, and this probably to some extent, as would seem from a Statute, 6 Richard 2d, c. 4, which provides that the exemplification of the enrolments of such Deeds as had before then been enrolled in the Rolls of Chancery and either Bench and Exchequer; and had been destroyed in the late insurrection or otherwise eloigned; should be as valid as the Deeds themselves.

Lord Coke's exposition, 2 Inst. 673, has been already noted. The principal reason given by the Courts in deciding that certain Statutes do not extend, will not apply to the present, while some have been considered in force, and others constantly acted on, which are liable to nearly the same objection as this.

The Statute of Mortmain, (which, by the bye, was passed after the establishment of numerous Colonies, without naming them,) and certain other Statutes mentioned by the Master of the Rolls in the case, 2 Merivale, 143, are inapplicable either in their object, or provisions, to the situation and condition of Colonies. So it is said by Lord Mansfield in 4 Burr, 2500, as to the Statutes 12 Rich. 2d. c. 2, and 5 & 6 Ed. 6, c. 16, that being positive regulations of police, they are not adapted to the circumstances of a new Colony, and therefore no part of the Law of England which every colony from necessity is supposed to carry with them at their first plantation.

The Statute of Frauds has been held not to extend to Barbados or Bermuda; but for the reason that they were settled before the passing of that Act, 2 P. Wm. 75, 8 Ves. 487.— For the like reason it was held in the Pennsylvania Courts in 1754, not to extend there. 1 Dallas 1.

His Honor the Chief Justice has already referred to some instances of the adaptation of English Statutes to our Provincial establishments; I will mention one or two others.

Exemplifications of the King's Letters Patent under the Great Seal of the Province, are of daily occurrence in the Courts, yet exemplifications are not evidence at Common Law, but made so by 3 & 4 Edw. 6, c. 4, and 20 Eliz. c. 6, which speak only of the *Great Seal of England.*

By Stat. 34, Ed. 3, c. 16, traverses of offices found before Escheators and certified into the Chancery shall be tried in the Court of King's Bench, yet it can hardly be doubted that the Supreme Court has authority to try such traverses in this Province.

The Stat. 29 Car. 2, c. 5, for issuing Commissions to take affidavits is in terms to the Judges of the Courts of King's Bench, Common Pleas and Exchequer, and expressed to be for the greater ease and benefit of all persons in the taking of

affidavits, to be made use of and read in His Majesty's Courts of King's Bench, Common Pleas and Exchequer, *at Westminster*. Yet this is the only original authority for the Commissions issued by this Court, the validity of which has never been questioned, indeed has been repeatedly recognised by the Legislature. Commissions to take Bail stand precisely on the same footing, depending on the Statute 4 W. & M. c. 4.

The Stat. 5, Eliz. c. 26, empowering the Queen's Courts in the Counties Palatine to make Inrolments was referred to by the Plaintiff's Counsel for the purpose of shewing the limited extension of the Stat. 27 Hen. 8, c. 16, but will not, I think, bear out his argument; for these were Courts of local jurisdiction within the Realm in existence at the time the Statute passed, and the act not having mentioned them, was considered not to embrace them, on the same principle which decides that Statutes passed after the settlement of a Colony do not extend to it, unless named therein. The Statute of Car. 2d. for Commissions to take Affidavits, was in the same manner extended to the Courts of the Counties Palatine, by specific enactment.

Another branch of the argument rested on this being a Mortgage Deed; but as this is not a proceeding to recover the amount secured on the Mortgage, but to obtain possession of the Land; I do not very well see how the Proviso inserted in the Deed of Bargain and Sale, for the benefit of the Mortgagor is to give it a more effectual operation to pass the Estate, than if no such Proviso were inserted and the Deed were absolute. The Statute of Inrolments does not make the Deed void *qua* deed, but merely says Lands shall not pass by Bargain and Sale, unless by Deed indented, sealed and enrolled. Lord Ellenborough in 3 East. 442, says,— "a Deed *qua* Deed certainly requires no Inrolment to give it "validity, that is not a thing which arises from, or is connected "with the nature of the Instrument itself." So had this Mortgage contained a covenant for the repayment of the money, without doubt an action thereon would be maintainable without registry or enrolment: but beside that, it is by no means clear that this is a case between Mortgagor and Mortgagee, to which the maxim could properly apply; and allowing even the parties to stand in that relation, the Plaintiff does not fail in this case by reason of a better or prior title to the Mortgage Deed, set up by the Defendant, but in consequence of his own omission, he has brought his ejectment before completing his legal seisin.

If satisfied as to the Law, it is not for Courts to regard consequences, but the only effect of our decision this day will pro-

bably be to enforce the Registry, and not the Enrolment of Conveyances, and in that respect cannot fail to have a salutary operation. As there must be a new trial on this point, I shall decline at present saying any thing on the other, not being quite satisfied that I clearly comprehend the purpose for which the parol evidence was tendered.

Rule absolute.

N. Parker, *E. B. Chandler* and *W. Chandler*, for the Plaintiff.

J. A. Street and *Weldon* for the Defendant.

READ vs. SMITH, AND OTHERS.

A Plea in Trespass justifying an entry upon land to re-take Timber of the Defendant, carried there by a sudden rise of water, in a river in which it was being floated and carried to market, held bad, because it was not shewn that the Defendants were not in fault, by having used their best endeavours to prevent the Timber coming upon the Plaintiff's land.

Semb.—An entry for such purpose and an injury to the herbage, and a subversion of the soil occasioned by the hauling and removal of Timber, are acts which cannot be justified by any averment of care and diligence to prevent the timber getting on the Plaintiff's land.

Trespass—The Plaintiff declared that the Defendants on &c. broke and entered a certain meadow of the Plaintiff in Bathurst, &c. and with feet in walking, and with cattle trod down, crushed and spoiled the grass and herbage—and cast and threw divers logs thereupon, and with the said cattle and the said logs tore up and subverted the soil, &c.

The Defendants pleaded,

1st. The General Issue—and each Defendant separately pleaded the following special Plea, viz.—

Action, non, &c.—because he says that, he, the said Benjamin D. Smith, before and at the said several times when &c. was seized and possessed of and of right entitled to a quantity of pine timber and other timber lying in the big Nepisighit River, above the said meadow, or close in which, &c. which said timber the said Defendant Benjamin D. Smith, was about bringing or floating down the said Nepisighit River to Bathurst to market, when the said River became very much flooded by an unusual flow of water, which sudden flood or

rise of water in the said River with the winds and natural current of the said river caused the said timber to be floated and driven about, and the said close or meadow being also inundated and overflooded by the said great rise or flood of waters in the said river, the said timber was against the will of him the said Benjamin D. Smith, and to his great injury and damage, floated and driven by the said flood, wind, and current, from the possession of the said Benjamin D. Smith, in, and upon the said close or meadow of the said Plaintiff, the said meadow being then, and ever since unfenced and unenclosed, and the said timber was there left upon the said meadow of the said Plaintiff, by the receding of the waters of the said river, without the power of the said Benjamin D. Smith to prevent it, and the said Benjamin D. Smith, having occasion for the said timber, and being under the most urgent necessity of taking the said timber to market to fulfil his contracts and engagements, and having no other means or way of obtaining or removing the said timber from off the said meadows or close, and knowing that the said timber would be much more injurious to the said close or meadows by remaining thereon, than by being removed from the said close or meadow, at the said several times when &c. entered into the said close or meadow, in the said Declaration mentioned, and with only so many oxen as were necessary for the purpose, and with as little damage as possible to the said close or meadow removed, and caused to be removed and hauled from off the said close or meadow, the said timber of the said Benjamin D. Smith, which had been so floated and driven thereon as aforesaid, as he the said Benjamin D. Smith lawfully might for the cause aforesaid; and in so doing, he the said Benjamin D. Smith, with his feet in walking, and with the said oxen unavoidably a little trod down, trampled upon, consumed, and spoiled the grass then growing, and being in the said close in which, &c. and subverted, damaged, and spoiled a little of the soil, sod, and sward of the said close or meadow, and the said oxen, at the said several times, when, &c. in passing and re-passing along the said close in the act of hauling off the said timber by stealth and morsels, and against the will of the said Benjamin D. Smith, eat up, and depastured a little of the grass there then growing on the said meadow or close, which are the said several supposed trespasses in the said Declaration mentioned, and whereof the said Plaintiff hath above thereof complained against the said Benjamin D. Smith, and this he the said Benjamin D. Smith is ready to verify, wherefore he prays judgment, if the said Plaintiff ought to have or maintain his aforesaid action thereof against him.

To this special Plea the Plaintiff demurred generally, and the Defendants severally joined in demurrer. The cause was argued in last Hilary Term.

End in support of Demurrer.

The Defendants by their Plea admitted the freehold and possession of the close to have been in the Plaintiff, they admitted also the act of tresspass, and justified the acts complained of because their timber had been against their will, floated by a sudden rise of the river upon the close of the Plaintiff—and because they were under urgent necessity of taking the timber to market, and because the close would have been more injured by the timber remaining there than by its removal.

This Plea could only be supported as an excuse arising by inevitable necessity; see 20 Vin. Abr. 526.—The Defendants asserted that their Timber which they had placed in the river to be carried to market, had been floated upon the Plaintiff's Land, but they had not averred that they were able to take care of their property even under ordinary circumstances, and having placed it in the river they were bound to take care of it, and prevent injury to others even by accident. It was not averred that the Nipisighit was a navigable river, 7 E. 207.—3 Bl. com. 210.—[PARKER J. referred to Anthony vs. Haney, 8 Bing. 186.]

The *Solicitor General* in support of the Plea.

The question was whether the fact stated in the Plea did not justify the Defendants going on the Plaintiff's close, the necessity was inevitable. The Plea stated that the timber was carried by a sudden and violent flood. The Defendants it appeared were unable to prevent its being carried on the Plaintiff's land, and had they suffered it to remain there, after they could have removed it, the owner of the close would have had a right of action against them. Com. Dig. Tit. Pleader. 8 Bing. 186.

Berton, in reply.—There was a distinction between an unavoidable accident and accident occasioned by carelessness or want of attention—it was the act of the Defendants which placed the timber in the River, and they should have averred their endeavours to prevent its going on the Plaintiff's land, and their ability under ordinary circumstances to have done so, and even had all that been averred it might be doubted if it would have been a justification, or if it would not rather have been a fact in mitigation of damages; their Plea admitted a subversion of the soil. Had the Plaintiff opposed the entry of the Defendants, they could not have justified using force. Had the timber floated across the Plaintiff's land, to land in the

rear, could the Defendants have justified passing across from the Plaintiff's land with oxen and teams, and thereby tearing up and destroying his meadow to save and retake their timber?

The Defendants should have tendered amends for the injury they had done, and if the Plaintiff had refused such amends, the circumstances would have been for the consideration of a Jury, under the general issue in mitigation of damages.

In this Term the Court gave Judgment in favor of the Demurrer.

CHIPMAN, C. J.—This is a case of demurrer to a plea—the action is trespass *quare clausum fregit*. Each of the five Defendants has pleaded separately the same plea in justification,

To which several pleas the Plaintiff has demurred. The demurrer raises the question as to the right of one man to enter upon the land of another for the purpose of taking his own property being upon such land. The late case of Anthony vs. Haney, 8. Bingham, 186, decides that such an entry cannot be justified singly from the fact that the Goods were upon the land, but that the circumstances must be shewn, under which the property came upon the soil of another. The validity of the justification will of course depend upon the nature of these circumstances. I have not found any modern cases upon this point. I cite the following from 20 Vin. Abr. 506.

"If A take my horse and carry him to the land of B. it is "not lawful for me to enter into the land and take him. But "if A feloniously steals my horse and carries him into B's. "land, then I may justify my entry into the land and retake "him." 2 Rolls. Rep. Higgins vs. Andrews.

"If A takes wrongfully the goods of another and carries "them into his own land, the owner may take them thence, "but not out of the land of a stranger.—*Ib.*

"If trees *are thrown down by the wind*, it is no tresspass to "enter the land into which they are thrown down to take "them. Lat. 13, per Crew, C. J. in case of Miller vs. Hawery."

"But if a *man cuts trees on his own land* which fall into ano-"ther man's land, and goes and he takes them, trespass lies." per Crew, C. J. Lat. 13 Cites 6th Edward IV. 7.

"If trees grow in my hedge hanging over another man's "land, and the fruit of them falls into the other's land, I may "justify my entry to gather up the fruit, if I make no longer "*stay there than is convenient, nor break his hedge.* Lat. 120, "per Doderidge, J."

"It is not lawful to do a tort to another to ease myself—"per Jones, J. M. Miller vs. Hawery. Lat. 120."

From the case of the trees blown down by the wind, and the

fruit falling from a tree overhanging another's land, it is to be inferred that if the goods come upon the land of another by mere accident, without any fault in the owner of the goods, the owner may justify an entry to take his goods. There is a case of an estray cited in Espinasses, treatise on the law of Nisi Prius, to the same effect.

"Trespass will not lie against the owner of an *Estray*, "for taking him off the lands of the Lord of the Manor who "had seized him, without paying for his keeping, for the own- "er had the property, and the Lord may have case for the "keeping, tho' he might have detained him till paid. Lady "Hutton vs. Coles, Cumberland, Sum. Ass. 1667."

In Com. Dig. title "Pleader" 3 M. 31, it is laid down as follows—

"It is no plea if *the accident* was by a *voluntary act or neg-* "*lect* of Defendant—as if a man lets a Falcon go at a Phea- "sant in his own land, and pursues it into the land of ano- "ther, tresspass lies—Lat. 13. If he cuts down a tree which "falls into another's land, and he enters to remove it. Lat. 13."

So in Popham 161, as cited in 8th Bing, 190, the case of the loppings of the trees, is put upon the same principle. "Per Crew, C. J. A man cuts thorns, and they fall into a- "nother man's land, and in trespass he justified for it, and "the opinion was that notwithstanding this justification, tres- "pass lies, because *he did not plead that he did his best endea-* "*vour to hinder their falling there.*"

From these authorities I think it is clear that where there has been any fault or neglect on the part of the owner of the goods, he cannot justify entering on the soil of another to take them, and he is bound to shew that there has been no such fault or neglect on his part.

The Plea in the present case states—"that the said river "become very much flooded by an unusual flow of water, "which sudden flood or rise of water in the said river, with "the wind and natural current of the said River, caused the "said timber to be floated and driven about, and the said "close or meadow being also inundated and overflowed by the "said great rise or flood of water in the said River, the said "timber was against the will of the said Defendant, and "to his great injury and damage, *floated and driven by the* "*said flood, wind and current,* from the possession of the "said Defendant, in and upon the said close or meadow of "the said Plaintiff, the said meadow being then and ever "since unfenced and unenclosed," which last circumstance of the meadow being unfenced is in the present case quite imma- terial. The pleas do not state that the Defendants used any

endeavours to guide the timber as it floated on the water, and to keep it within the channel of the River, and away from the Plaintiff's land. They appear to have bestowed no care upon it, but to have abandoned it altogether to the action of the winds and water. This is a fault on their part, which under the authorities I have cited, I think, is of itself decisive that they cannot justify their entry on the Plaintiff's land to take the timber—and on this ground I think the several pleas are certainly bad. I am not indeed prepared to say that even without this fault on their part, they could have justified the trespasses complained of, in entering upon the Plaintiff's land against his will, and hauling the timber off with oxen, which upon their own shewing, necessarily subverted and injured the soil. There should in such a case, have been a previous request to enter, and they must in all events have been liable for any damage done to the land; for if the Timber came upon the land without the fault of the Plaintiff, he should not suffer any loss thereby, and it being the Defendants' property, it was their affair to take it away without doing wrong to the Plaintiff, for "No man shall do a tort to another to ease himself." In Anthony vs. Haney, 8 Bing. 186. L. C. J. Tindal expresses himself as follows:—

"If the occupier of the soil refuse to deliver up the property or to make any answer to the owner's demand, a Jury might be induced to presume a conversion from such silence, or at any rate the owner might in such case enter and take his property, *subject to the payment of any damage he might commit.*"

But however different circumstances might vary the rights and remedies of the parties, I am of opinion that it is sufficient for the decision of this case, that the Defendants have not shewn that they were not in fault, by having used their best endeavours to prevent the timber coming upon the Plaintiff's land, and that upon this ground, there must upon these demurrers be Judgment for the Plaintiff.

BOTSFORD, J. concurs.

CARTER, J.—The Judgment of the Court of Common Pleas in Anthony vs. Haney, 8 Bing. 186, seems to me to establish that there may be circumstances which will justify a man's entering upon the land of another to take thence his own property. That case further establishes, that every plea which attempts to justify a trespass on such ground, must state the peculiar circumstances on which the party rests his right to enter. In all cases where such a justification is pleaded, it behoves the Court to look very narrowly into the

circumstances stated in the Plea, and to take care, lest (in the words of C. J. Tindal,) "too wide a door be opened for parties to attempt righting themselves without resorting to law."

It seems to me that in a plea of this description it should clearly appear on the face of the plea, that this coming of the Defendant's property on the Plaintiff's land, was, not only not caused by any act on the part of the Defendant, but, was owing to circumstances against which he could not have been reasonably expected to take precaution. Now this plea does not state that any precaution was taken to secure this timber, or that it was under the care or charge of any person; it merely states, that the timber was lying in the big Nipisighit river, (which river is not stated to be a navigable river, nor one in w[illegible]ch the Defendant's timber might rightfully be.)

If we were to decide that the owner of timber allowing it to lie in a river, (which is of course subject to a rise of water, at particular seasons,) without taking any precaution to prevent his timber from floating on another's land, may after the timber has been so deposited on that land, and without the permission of the land owner, enter and recover the timber, I think we should be establishing a principle not warranted by law, and which would have a very bad effect throughout the country—this principle I think we should establish, if we held this plea sufficient, and I am therefore of opinion, that the Plaintiff must have Judgment.

PARKER, J.—To what has been already said on the defect apparent in the pleas in this case, which is the main ground of the Judgment pronounced by their Honors the CHIEF JUSTICE and Mr. Justice CARTER, I shall add nothing except my perfect concurrence in the doctrine that to a justification of the nature of the present, it is an essential allegation that the Defendant did all in his power to prevent the property getting on the close of the Plaintiff; but there is another, and what appears to me a more material ground of objection coming fairly up for the consideration of the Court on this Demurrer, on which I shall take the liberty of making a few remarks.

I would premise by saying that the only foundation I can find in any direct decision of the Courts for the general doctrine stated in the text-writers and Digests, and occasional *dicta* of Judges as to the right of one man to enter without permission on the lands of another in order to recover his goods, which have *accidentally* got there, are in two ancient cases of the time of Edward 4th; those which have already been referred to from Viner's abridgment, viz. That cited from the Year Book, 6, Ed. 4, 7, by. Crew C. J. in Miller vs. Fawdrey, Latch 13, of the tree blown down; men-

tioned also in Brook's abridgment, pl. 310, as cited by Choke J.—see 20 Vin. Abr. 467. And the case of the fruit falling quoted also in Viner, as an opinion of Doddridge, J. in Miller vs. Hawery, Latch 120; but which appears by the report of the same case in Popham, 161, to be a case in the Year Book, 8 Ed. 4, and to which there is this qualification given in Latch, that the hedge must not be broken.

We have not in this Province the Year Books to refer to, but probably the Abridgments (the cases are cited also in Comyn and Bacon) contain all that is material. It would appear indeed from Bac. Abr. Tit. Trespass F. that Miller vs. Fawdrey, decided the right of entry to take the fruit, but that is not so; that was not an action of trespass, *quare clausum fregit*, but trespass for chasing sheep in which the nice question was discussed, whether your dog in chasing your neighbour's sheep off your land could go an inch beyond the line without making such chasing a trespass; the case of the fruit is certainly referred to by the Judges as good Law. With respect to the two decisions in the Year Books, it must be observed that they are both in terms confined to a right, which I may without impropriety style a reciprocal right, between two adjoining proprietors to be exercised each on the border of his neighbor's land; that they have not been expressly affirmed or even much considered in any recent case, and that no direct decision has extended the common law principle, beyond that which is necessary to their support. It is not however, material to the present case, that it should be so limited in its application, for we are not bound now to decide whether the *mere* entry for a purpose like that before us would or would not be a trespass, if the accident had been unavoidable, and the entry unattended by damage; although that seems by the margin of the Demurrer Book to be the point which the Plaintiff was mainly desirous of raising on this argument. The declaration complains of real damage sustained by subversion of the soil and sward, and destruction of the grass, and the pleas admitting the damage attempt to justify the acts complained of, and assert a right to enter on the close, though such entry necessarily and unavoidably occasioned damage to the Plaintiff, and this without any previous notice, request, or demand, any tender of amends, or liability to make compensation for the damage actually done,—now no case has been cited, nor can I believe, be found where a justification has been sustained to this extent. The plea in the late case from 8 Bing. was considered clearly bad on very general grounds, and it will be noted that Judgment was there given immediately without hearing Counsel in support of the Demurrer;

but I can see nothing in what fell from the Court on that occasion to justify an entry producing actual damage, indeed the concluding expression of Lord C. J. Tindal, that the owner might enter to take his property, when the occupier refused to deliver it, *subject to the payment of any damage he might commit*, is rather against than in favor of the position; for if he is liable to this payment, how is it to be recovered but in an action of trespass? The Plaintiff would not surely be put to his action on the case, and no contract could be presumed. The Defendant in the case before us must go the whole length of contending for the right to do damage without making compensation, for as was said in the case of Ball vs. Herbert, 3 T. R. 253, if the right were but a qualified one, the plea should have been adapted to it. That was an action of trespass, in which the Defendant justified under a general claim of right to tow on the banks of a navigable river, on which the Plaintiff's land bounded, Lord Kenyon then said— "The Defendant claims a common law right *without making* "*any compensation*; if he has only a qualified right he "should have adapted his plea to it; for if he were to obtain "Judgment it would ascertain his right to the extent claimed "on this record, namely, *a general right without making any* "*compensation.*" Ashurst, J. gave his opinion to the same effect; though on this particular point Mr. J. Buller reserved his opinion, concurring however, in the general Judgment of the Court against the right.

It will I think tend to elucidate this case when the ground on which a way of necessity depends is considered; it has been argued as if necessity gave a way, but it is clear from the note of Mr. Sergeant Williams, to Pomfret vs. Rycroft, 1 Saund. 322, that a way of necessity must arise from prescription or grant; this is fully recognized in 2 Bing. 83, 2 Peak, 153, 8 T. R. 50.

Two cases are mentioned in 3 Com. Dig. p. 58, of a right of way to a wreck, of which a man has a grant, and to a navigation; but the first of these stands evidently on the King's prerogative, and the latter it has been expressly decided, is not a right at Common Law, but warranted only by particular custom.

In the case of Ballard vs. Harrison, 4 M. & S. 387, confirming that of Taylor vs. Whitehead, Doug. 745, it was decided that if a private way which was the only road to the land were impassable, it would not justify going on the land adjoining, for (as was then said) "it does not follow that a "man can go over his neighbour's land, because he hath no "other way to his own." There is another case in 1 Siderfin,

251, cited by Sir John Strange, in argument in 1 Wils. 107, which tends to show how very unstable a ground that which is called necessity is—it is as follows—"where a man has a right "of common, and the soil happens to be so overflowed that "he cannot enjoy it, without digging trenches to drain it, yet "if he does dig trenches to drain it, the owner of the soil may "bring trespass." The case in Wilson is worth noting in support of the position that, though the right of entry may exist yet breaking the soil will be a trespass, and that compensation for the damage is properly recoverable in an action of trespass, where there is no contract or agreement. I have also here much pleasure in recommending to the attention of any persons who may be placed in a similar situation with the Defendants, the very good advice given by Mr. Chitty in his late work on the general practice of the Law, vol. 1, p. 568; he does not, as will be seen, treat the right of entry as so clearly ascertained, even in a case of pure accident, as to recommend the unqualified assertion of it, but points out a much more prudent course of acting. As to the necessity of a previous demand or request, there is a case from Fitz. Abr. cited in Com. Dig. (the new edition by Hammond) which has not I think, been mentioned, 6 Com. Dig. Tit. Pleader 3. M. 39. "It is not a good justification "that J. S. was possessed of a piece of timber which was "placed in the *locus in quo* by a tempestuous wind, and that "Defendant entered as a Servant to carry it away, because it "does not appear but that the timber might have been purposely exposed to the wind in such a manner as to make "the wind blow it into the Plaintiff's close; *because it does "not appear to have been fetched away at a proper time*, because it does not appear that the timber belonged to J. S. "when it was blown over, *and because it does not appear that "Plaintiff was requested to permit the removal.*—2 F. 183."

On the whole I am of opinion that the acts complained of in this case could not be justified, had the pleas even averred that the utmost care and diligence were used to prevent the Defendants' timber getting on the Plaintiff's land; and I entertain so much doubt as to the mere right of entry in a case like the present, as to wish the subject may come under the consideration of the Legislature, who in establishing a right (if it be essential to the business of the country that such should exist,) may put the exercise of it under proper restrictions. The provision in the Statute of Limitations 21 Jac. 1, c. 16, S. 5, as to involuntary trespasses may afford a useful precedent for their consideration. There is I should observe, a special Act in the State of Massachusetts passed in the year

1793, which then included the present neighbouring State of Maine, authorizing the owner to remove timber which has been floated on the lands of another, on paying or tendering such reasonable damages as may be occasioned by the removal; which is also deserving of attention.

For the reasons above assigned, I concur in opinion that there must be Judgment for the Plaintiff on these Demurrers.

End & Berton for Plaintiff.

The *Solicitor General, J. A. Street & Kerr* for Defendants.